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John A. Scanlan

Indiana University Maurer School of Law

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CALL AND RESPONSE: THE PARTICULAR AND THE GENERAL

John A. Scanlan*

I. PRELUDE

A. *A Personal Experience*

The year is 1980. The setting is Liberty City, on the western edge of downtown Miami, a few blocks from the Orange Bowl. A few months later, flames ignited by the worst race riot in the city's history will singe the palm trees and storefronts flanking the street where I walk.¹ I enter a building with concrete walls. My host from the INS greets me and ushers me up a flight of stairs.

Hundreds of Cuban and Haitian "boat people" are standing in long lines in the center of a large, open hall. At one end, in small but comfortable glassed-in offices, the INS is conducting asylum interviews of recently arrived Cubans. I am invited to observe the interview of a coffee-colored, elderly man. The immigration officer asks him to explain why he had left Cuba. A translator transmits the question and his answer. "I want to join my children and grandchildren in the U.S.," he says. Pressed to say more, he explains that he is growing old, that it is difficult to find work in Cuba, and that he wants to join his children and grandchildren. As we leave the office, my host explains that the man's motives for departing Cuba are political, that he had clearly suffered "persecution," and is eligible for asylum.

At the other end of the hall, off a corridor, the INS is interviewing Haitians. I am ushered into a room slightly larger than a broom closet. It is windowless, furnished with a metal table, several metal chairs, perhaps a metal filing cabinet. A beautiful dark black woman, probably still in her teens, sits in one of the chairs, cradling a baby. Asked why she left Haiti, she replies, in a voice that renders translation superfluous, "Le misère, le

* Professor of Law, Indiana University School of Law at Bloomington. A.B. 1966, University of Notre Dame; M.A. 1967, University of Chicago; Ph.D. 1975, University of Iowa; J.D. 1978, Notre Dame Law School.

1. See Gregory Jaynes, *Troubled Liberty City Ponders Secession*, N.Y. TIMES, Aug. 10, 1981, at A8.

misère." As we leave, my host explains that she is "clearly an economic migrant."

B. *A Historical Account*

The Irish who emigrated to America in the eighteenth and nineteenth century were fleeing caste oppression and a system of landlordism that made the material conditions of the Irish peasant comparable to those of an American slave. They came to a society in which color was important in determining social position. It was not a pattern they were familiar with and they bore no responsibility for it; nevertheless, they adapted to it in short order. . . . The outcome was not the result of blind historical forces, still less of biology, but the result of choices made, by the Irish, and others, from among available alternatives. To enter the white race was a strategy to secure an advantage in a competitive society.

....

The first Congress of the United States voted in 1790 that only "white" persons could be naturalized as citizens. Coming as immigrants rather than as captives or hostages undoubtedly affected the potential racial status of the Irish in America, but it did not settle the issue, since it was by no means obvious who was "white."²

II. FRAMING THE CALL

A. *Author*

In a recently published article, Kevin Johnson has "identif[ied himself] as a Latino, specifically a Mexican-American or Chicano."³ Self-identification is an important part of his story. One side of his family is, as he puts it, "Anglo;" the other side, "Mexican-American."⁴ His Mexican American mother and grandmother raised him in an English-speaking, assimilation-oriented household.⁵ Although the process of self-identification was for many years unconscious—and always influenced by familial circumstances—he characterizes it ultimately as a "choice":

For the most part, I was never forced to present myself as Mexican-American. Although it may be difficult for some Latinos to "pass" as White due to phenotype, surname, language skills, or accent, I could, if I chose. I might have ignored my background and hoped that nobody would remember, find out, or care, although to do so I would have had to deny a family history that grew increasingly central to my identity over my lifetime. Exemplifying the volitional na-

2. NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* 59 (1995).

3. Kevin R. Johnson, "Melting Pot" or "Ring of Fire"? *Assimilation and the Mexican-American Experience*, 10 LA RAZA L.J. 173, 177-78 (1998).

4. *Id.* at 178.

5. *See id.* at 180, 186.

ture of racial identity, my brother, with sandy blond hair and blue eyes, exercised his right to choose in a different way. He never identified as Mexican-American.⁶

B. Race and Racism

Johnson's identification with the Mexican American side of his background is, in one sense, not unusual. Many Americans choose to identify with the heritage of a particular parent or grandparent, to label themselves Anglo American or Irish American or Polish American. But Johnson uses the word "Mexican" in the phrase "Mexican-American" to convey more than simple ethnic identity. In his view, to identify as Mexican American is to choose not "to 'pass' as White."⁷ And to be identified by others as Mexican American is to be the object of various forms of intolerance and discrimination, ranging from bigoted bar-room jokes⁸ to government programs intended to minimize Mexican immigration.⁹ "Mexican" is thus a racial term, something that stands in contrast to another racial term, "Whiteness." To identify with one's Mexican ancestry, Johnson argues, is to identify with the forgotten,¹⁰ the oppressed.

As the title of the article appearing in this issue indicates—and as virtually all of Kevin Johnson's work over the last decade or so reveals—this process of identification promotes inquiry into "race matters" of every sort: the meanings of "race" and "racism," their manifestations in

6. *Id.* at 179–80.

7. *Id.* at 180.

8. One such joke is as follows:

In the spring of 1996, I was sitting in a bar . . . in . . . California. . . . [A] tall fellow sitting on the barstool next to us talked . . . about a recent trip to Texas. . . . For whatever reason, I tuned into one particular joke, which went something like this: "How do you make sure that nobody steals the stereo speakers in your car." Without waiting for a response, he eagerly offered the punch line: "You put a sign on them saying 'no habla espanol.'"

Id. at 176.

9. In his writings, Johnson offers a number of examples. One is California's Proposition 187, approved on November 8, 1994, and codified at CAL. EDUC. CODE § 48,215(a) (West Supp. 2000), CAL. HEALTH & SAFETY CODE § 130(a), and CAL. WELF. & INST. CODE § 10,001.5. See Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1144 (1998) [hereinafter Johnson, *Heart of Darkness*] ("Race played a prominent role in the passage of California's Proposition 187, one of the racial milestones of the 1990s. . . . Television advertisements emphasizing [Gov. Pete] Wilson's unqualified support for Proposition 187 showed shadowy Mexicans crossing the borders in large numbers. Supporters blamed undocumented Mexicans for California's economic woes . . ."). See generally Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Irrelevance of Race*, 70 WASH. L. REV. 629 (1995) (discussing the effect of immigration politics on the passage of Proposition 187).

Other examples include the "repatriation" of "Mexican immigrants as well as citizens of Mexican ancestry" during the Great Depression, *id.* at 1136, and the recruitment and subsequent treatment of "an estimated one million Mexican workers who were temporarily admitted into the country to work in agriculture" in the 1940s and 1950s, *id.*

10. Cf. Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139, 1139 n.* (1993) ("*Los Olvidados*, *The Forgotten*, is the title of a 1950 film by Spanish filmmaker Luis Buñuel about impoverished children living on the streets of Mexico City.").

private and public life; the ways that racial attitudes and related actions affect public policy and law; and the ways that those attitudes and policies might be countered or changed. In many respects, his project is nearly identical to that of the critical race theorists and scholars with whom he identifies and whose method and work he hopes to advance.

Several similarities stand out. I lay them out here but reserve sustained comment on the underlying assumptions or theories, and the body of scholarship supporting them, until after I have described the "call" Johnson is making and my initial reactions to it.

First, Johnson resists formal definitions of "race," arguing instead that there is nothing essential or biological about the term. Rather, two radically different sources give it meaning: the dominant group in its conscious and unconscious attempt to justify privilege by seizing on superficial differences and treating them as essential; and the internalization of subordinate status by those who have been dominated.¹¹ "Racism," within this framework, is "socially constructed;"¹² it exists primarily as a set of psychological "facts," discursive practices,¹³ and social attitudes that often are not fully understood or "intended" by those who display them. For this reason, "racist" laws and policies need not be fully understood or explicitly intended as such by those who promulgate them; it is enough that they arise out of, support, and help perpetuate an unjustifiable system of domination and subordination.¹⁴

11. See Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship*, *Law in the Ivory Tower*, and the *Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 528 n.10.

12. See *id.* at 554 n.150 (collecting multiple sources in support of the general proposition "that race is a social construction"); see also Kevin R. Johnson, *Racial Restrictions on Naturalization: The Recurring Intersection of Race and Gender in Immigration and Citizenship Law*, 11 BERKELEY WOMEN'S L.J. 142, 145, 148-49 (1996) (reviewing IAN HANEY LÓPEZ, *WHITE BY LAW* (1996)).

13. I believe that Professor Johnson's focus on the ways that scholars present arguments and his concern that "mainstream" scholars pay too little attention to race are both tied to a sense that racism largely has "gone underground," that it employs a "neutral" vocabulary to procure repressive ends. It, therefore, becomes necessary to explore silences, euphemisms, and rhetorical excess for their hidden meanings. For more overt expression of this point of view, see Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 10 LA RAZA L.J. 57 (1998). In particular, Professor López explains:

[T]he elimination of race as a language for understanding . . . should be avoided. Put differently, this Essay objects to the Court's evasion of race in *Hernandez* [*v. Texas*, 347 U.S. 475 (1954),] even as it applauds the result in that case. It does so not because in the individual case one cannot fully engage the social reality of race without using a social vocabulary; as *Hernandez* demonstrates, with care one can largely do so. Rather, the objection is rooted in the firm sense that the general abandonment of racial language and its replacement with substitute vocabularies, in particular that of ethnicity, will obfuscate key aspects of Latino/a lives.

Id. at 67.

14. Of course, Johnson believes that "[f]actors that appear racially neutral . . . may mask legally impermissible racial motives." Johnson, *supra* note 11, at 534. Johnson opines further:

The modern immigration debate often is racially polarized. Unlike the old Chinese exclusion laws, however, the modern immigration laws for the most part are facially race-neutral. Despite the *facade* of neutrality, these laws have unmistakably disparate impacts on immigrants of color from developing nations.

Id. at 532 (emphasis added). Clearly, Johnson believes that immigration law scholars can and should seek to pierce that facade, that cost arguments and other supposedly neutral "arguments for restric-

Second, Johnson shares the belief of other critical race theorists and scholars that storytelling, particularly of a highly personal or autobiographical cast, can illuminate the situation of those who are dominated and cast into sharp relief the realities of racism and discrimination that traditional legal scholarship usually ignores.¹⁵

Third, Johnson and other critical race theorists and scholars believe that history casts a persistent shadow; that racism directed at blacks, Asians, and Hispanics is an old phenomenon; and that by exploring its sources, development, manifestations, and influence in the past, we can achieve a clearer vision of the present—and perhaps some insight into the future.

C. Focus

As already demonstrated, Kevin Johnson's other work at times has focused on the personal dimensions of race and racism. More often, it has focused on the legal and political dimensions and looked directly at such historical instances of racial subordination as the Chinese exclusion laws or the Bracero programs of the 1940s and 1950s¹⁶ or at contemporary statutes such as California's Proposition 187,¹⁷ the Immigration Amendments of 1965,¹⁸ the Welfare Reform Act of 1996,¹⁹ or the North American Free Trade Agreement.²⁰

tionist measures" often are susceptible to analysis that reveals the actual discriminatory intentions of those making them. *Id.* at 534.

Yet in much of his work, Johnson argues explicitly or implicitly that "intent" need not be overt. As he put it in his *Indiana Law Journal* piece, "[s]ubordination of Asian immigrants and the use of quotas to exclude racialized peoples, among other devices, evolved into more subtle forms of exclusion with the transformation of racial sensibilities in modern times." Johnson, *Heart of Darkness*, *supra* note 9, at 1115–16.

15. See, e.g., Johnson, *supra* note 3. Professor Johnson writes:

To analyze some difficult but crucially important issues for Latinos in the United States today, I plan to borrow from my mother's experiences. Though aware of the alleged deficiencies of the use of autobiography in legal scholarship, I write this hoping to bring to the fore the stories of some Latinos who have been invisible or ignored, and to offer more general insights based on those experiences.

Id. at 178; see also *id.* at 177 ("[The bar-room] story shows how a few words may hurt and marginalize. It also, I thought, demonstrates the limits of assimilation for Latinos, even those who are half-White and look the part."); *id.* at 179 ("My experiences exemplify how, because race is a social construction, people—at least some—decide to be Latino."); *id.* at 180 ("My family history exemplifies Latino heterogeneity."); *id.* at 181–82 ("Some of my experiences exemplify the difficulties of forcing people into hard-and-fast categories, which law and society inevitably attempt to do."). Johnson also explains that:

The stories of my mother and grandmother reflect the difficulties of assimilation for Latinas. Moreover, they serve as sad metaphors for the story of assimilation of Mexican-Americans in the Southwest. My experiences reflect the amorphousness of the concept of race, the difficulties resulting from racial uncertainty, and the complexities of racial mixture in a time of identity politics.

Id. at 182–83.

16. See *supra* note 9.

17. See 1994 Cal. Legis. Serv. Prop. 187 (West) (codified at CAL. EDUC. CODE § 48,215(a) (West Supp. 2000); CAL. HEALTH & SAFETY CODE § 130(a); CAL. WELF. & INST. CODE § 10,001.5).

18. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. §§ 1101–1188 (1994)). Subsequent amendments have made additional changes in the Immigration and Nationality Act (INA). As amended, the INA substitutes a worldwide "ceiling" on legal immigration

Johnson's latest article looks instead at the ways that individuals with a particular disciplinary and institutional background deal with issues of race and racism. Indeed, it is addressed directly to them. Thus, the article deals with its subject at one remove. It focuses on the scholarly practices of legal academics who write about immigration law.

D. Audience

Kevin Johnson speaks to "two distinct audiences."²¹ He challenges "minority scholars engaging in [critical legal scholarship]" to "unravel the intricacies of legal doctrine and the racial discrimination that it obscures."²² His critique is broad enough to implicate the publishing prac-

for the old "national origins quota" (NOQ). 8 U.S.C. §§ 1151–1152 (1994 & Supp. IV 1998). The NOQ established differential quotas for every country in the world. Those quotas were keyed to the percentage of American citizens claiming a particular national origin. See Act of Oct. 3, 1965, § 3, 79 Stat. at 913. The quotas were also skewed to minimize the number of visas available to Asians and to people still subject to colonial rule—including virtually all Africans. The system applied only to countries in the "eastern hemisphere," although nonquantitative rules adversely affected the migration of those considered "undesirable" who hailed from the Caribbean and Latin America. See *id.* The system awarded the great majority of visas to natives of only three nations: England, Germany, and Ireland.

As amended, the INA makes immigration available in three broad categories: to migrants entering the United States on the basis of close family relationships to U.S. citizens or "permanent residents," see 8 U.S.C. § 1153(a) ("family-sponsored" immigrants); to those with particularly desirable job skills or substantial capital to invest, creating jobs in the United States, see 8 U.S.C. § 1153(b) ("employment-based" immigrants); and to so-called diversity or lottery migrants, whose visa eligibility is premised on the notion that the countries they hail from have been "underrepresented" in the allocation of visas in recent years, see 8 U.S.C. § 1153(c). The principal intended beneficiaries of the "diversity" visa program have been migrants from Ireland. See Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 74 n.234 (1998) (stating that the program was designed to favor Ireland and other northern European countries) (citing *Legal Immigration Legislation: Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the House Comm. on the Judiciary*, 100th Cong. 7 (1998)). Under the present system, a maximum of approximately 25,000 visas in a particular year are made available to applicants from any particular country. See 8 U.S.C. §§ 1151–1152. Year after year, a few countries "oversubscribe" their quotas by large margins. These include, inter alia, the Philippines, Mexico, the People's Republic of China, the Dominican Republic, India, and Korea. See, e.g., BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, *Immigrant Numbers for March 2000*, 8 VISA BULL. NO. 16, Mar. 2000, ¶ 4 (establishing special cut-off dates "for a foreign state or dependent area when visa demand exceeds the per-country limit[, which] apply at present to the following oversubscribed chargeability areas: INDIA, MEXICO, and PHILIPPINES").

In the instant piece, Professor Johnson quotes with approval an article criticizing the 1965 amendments and their successors, because the "per country limits . . . and the 'diversity' visa program" have, in Johnson's words, "unmistakably disparate impacts on immigrants of color from developing nations." Johnson, *supra* note 11, at 532.

19. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105. Professor Johnson discusses this statute briefly in his article appearing in this issue. See Johnson, *supra* note 11, at 533.

20. The North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 296 (1993). For Johnson's discussion of this treaty, the treaty's failure to open U.S. borders to Mexican migrants, and the treaty's relationship to the 1848 Treaty of Guadalupe Hidalgo [Treaty of Peace, Friendship, Limits and Settlement with the Republic of Mexico, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922], see generally Kevin R. Johnson, *An Essay on Immigration, Citizenship, and U.S./Mexico Relations: The Tale of Two Treaties*, 5 SW. J.L. & TRADE AM. 121 (1998).

21. Johnson, *supra* note 11, at 527.

22. *Id.* To do so, "[t]hey must confront the traditionalists in the conventional immigration venues

tices of leading law reviews, intent on publishing well-established, "imperial" scholars.²³ Yet the second group he explicitly addresses are "mainstream immigration scholars focused on legal doctrine."²⁴

"Mainstream" scholars are Johnson's principal target. Clearly included in this group are the editors of the two leading immigration casebooks and a number of scholars named in the footnotes. Otherwise, however, his description of his "mainstream" audience is imprecise. I believe that Johnson intends to include all scholars, "White" or minority, who tend to ignore issues of race and racism in their writings. He also may intend to include scholars who *do* address those issues at least occasionally but usually do so without making direct reference to critical race scholarship or theory. However, his use of the term "ivory tower" and his explicit reference to "scholars focused on doctrine" generate significant uncertainty. For, as I will argue below, many of the scholars who have paid little or no heed to critical race scholarship or theory have listened to the stories of migrants they have chosen to represent and have confronted the injustices of contemporary immigration law with weapons that include—but are hardly limited to—doctrinal arguments.

E. *Description and Proscriptive Norms*

Kevin Johnson's article gives its readers a very quick overview of the scholarship it is promoting and the scholars it is evaluating. Rather than exhaustively describing the work of Critical Race Theory and scholarship or "mainstream immigration scholarship," it makes a fairly general claim that there are "two separate legal discourses on immigration—an 'ivory tower' perspective focusing on doctrine and race scholarship"²⁵ and that they are, metaphorically speaking, "ships passing in the night."²⁶ The article seeks to bring these ships within hailing distance of each other and to permit the passengers on each to exchange opinions. Yet the piece's overall tone is proscriptive, rather than permissive. Critical race scholars are told that they should pay more heed to doctrine and enter more mainstream "venues" to promulgate their ideas. "Mainstream" scholars, however, are issued a more demanding challenge or call.

and initiate a true race and immigration dialogue." *Id.*

23. Following the lead of Stephen Shie-Wei Fan, Note, *Immigration Law and the Promise of Critical Race Theory: Opening the Academy to the Voices of Aliens and Immigrants*, 97 COLUM. L. REV. 1202, 1228 (1997), Professor Johnson consciously deploys the term "imperial scholar," initially coined by Richard Delgado. See Johnson, *supra* note 11, at 527. As used by Delgado, the term described a self-perpetuating scholarly elite, incestuously cross-referencing each other, promoting each other's work, and dominating the pages of the so-called top law reviews. See Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 573 (1984); Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outside Writing, Ten Years Later*, 140 U. PA. L. REV. 1349, 1350 (1992).

24. Johnson, *supra* note 11, at 527.

25. *Id.*

26. *Id.*

III. THE CALL

Professor Johnson contends “that mainstream immigration law scholarship fails to confront squarely the reality of the influence of race.”²⁷ He hopes to convince those who practice such scholarship to do three things: confront that reality; “consider racial critiques of the law, including Critical Race Theory, Critical Latina/o Theory, and Asian American legal scholarship;”²⁸ and accept the “daunting challenge of ensuring the removal of racial discrimination’s taint on the development of immigration law and policy.”²⁹ Johnson clearly believes that these tasks are so closely interrelated that they may, in fact, be inseparable. Thus, he strongly implies that it is impossible to confront the reality of race in America without employing concepts borrowed from “critical” scholarship and committing oneself to the eradication of every trace of racism in immigration policy and law. To those scholars who believe that “race is not a significant factor in the formulation of modern immigration law and policymaking and that the race scholarship overstates the influence of race”³⁰ and to those who argue that “doctrine is neutral, and the race scholars have failed to make the case that race factors into the analysis,”³¹ Johnson lays down a direct challenge: “One . . . might hope that those who hold these views would explain and defend them rather than wholly ignore the racial critique of immigration law and policy.”³²

IV. FRAMING THE RESPONSE

A. *Author*

I am an Irish American Catholic, “white” by any definition currently in vogue. As best I can tell, each of my ancestors migrated to the United States from Ireland directly or by way of Canada. All arrived in the New World during the nineteenth century; the earliest probably in the 1820s, the latest about 1880. My father grew up in a small, predominantly Irish Catholic, working-class neighborhood in Milwaukee, surrounded by German Americans and Polish Americans. My mother grew up in considerably more glitzy surroundings, first in Catholic St. Paul and later on Milwaukee’s more ecumenical North Shore. Neither of my parents encountered many blacks, Latinos, or Asians when they were children. Those they did encounter almost certainly were employed in menial jobs—as gardeners, maids, railroad porters, parking lot attendants, and the like. I am certain that both my parents were raised in an atmos-

27. *Id.*

28. *Id.*

29. *Id.* at 526.

30. *Id.* at 552-53.

31. *Id.* at 553.

32. *Id.*

phere of casual racism. I vividly remember standing next to my maternal grandfather, Thomas McCormick, waiting for his car on a rain-slicked street and watching the black attendant wheel his Buick down the ramp of the parking garage with amazing speed. I remember that my grandfather called him "boy" and tipped him a quarter.

I admired and loved my grandfather immensely. He had raised four daughters and a niece but never a son. I was his first grandchild, the son he had never had. Until I was thirteen or so, I spent each summer and each Christmas with him and my grandmother. Twice, I spent entire school years with them.

My parents were not happily married. My father was a professional actor, an immensely talented man haunted by demons. In 1954, he won a New York drama critic's award for the best performance off-Broadway that year. A decade later, Doubleday published his first novel. A prominent New York gallery gave his drawings in pen and ink a show. He wrote plays, delivered wickedly funny impressions of famous actors, and always had a story to tell, usually about himself. He read novels by Dickens and plays by Ibsen aloud to his two oldest children—my sister Brigid and myself—doing each character in a different voice. Hedda Gabler sounded something like Marlene Dietrich. He also drank heavily, struggled with his sexual identity, made enemies, lost job after job, and was effectively blacklisted by some of the best directors in New York. His experiences in the Army and later in the theater had made him a liberal, racially aware and tolerant. He voted Democrat.

My mother was raised a Republican and remained one her entire life. Her great act of rebellion was marrying my father. She paid for it. As a teenager, she finished second in a national short story writing contest. She had the quickest mind of anyone I ever met. Yet she taught as a substitute teacher for years in some of the worst schools in New York so that she could put bread and milk and peanut butter and Kraft macaroni and cheese on the table. She loved to shop at thrift stores. Later, after we moved to an all-white suburb in New Jersey, she found a permanent teaching position. When she died three years ago, she left a substantial nest egg to her four children, almost all saved up from forty years of public school teaching. However much she sought to establish her independence from her father, in the end she bought into his Horatio Alger philosophy.

To one of my mother's sisters I owe the insight that my beloved grandfather *was* Horatio Alger, that it was *that* sort of mythic life he led. One of thirteen children, the son of immigrant parents, fatherless at an early age, he served as principal support for his family while working his way, first through private high school, then college, then medical school. He held down multiple jobs, lighting the street lamps before the sun came up, delivering papers and groceries, shoveling coal, and working one summer as a lifeguard hoping that no one would call for help be-

cause he had never learned to swim. He believed that his success was due to hard work. And of course it was. But it probably never occurred to him that the lamp lighting job, the delivery jobs, and the lifeguard job were opportunities available to Irish kids growing up on the south side of Milwaukee but not to the few black families who had migrated to that city before the Great Depression and were struggling to make a living there. Their poverty, in his eyes, was a “natural” fact, something attributable to skin color, laziness, and genes and not to segregation and lack of opportunity.

Privilege comes in many flavors. For years I identified exclusively with my mother’s side of the family, the more abstemious and conventional side, the side that seemed more ambitious and more successful. I shuttled between the white suburbs of Milwaukee and the racially mixed neighborhood of Morningside Heights in Manhattan—and I much preferred the suburbs. As an eleven- or twelve-year-old child, I journeyed alone through New York City to get allergy shots. Every other Saturday, I walked down a long flight of steps into Harlem, crossed Morningside Park, and caught the downtown subway. An hour or so later, I repeated the journey in reverse. Most of the people I encountered along the way were black or brown. Almost always, they were friendly, often helpful. No one ever threatened, hurt, or hassled me. Yet I was almost always afraid.

No single event converted me from a young Republican to a liberal, perhaps even radical, Democrat. My awareness of race and its relationship to privilege was gradual, not sudden. I do not claim that even now the conversion has been total. Unlike Saul, I was not struck down by a single flash of lightning. Instead, events accumulated. Those I name were memorable, but they constituted only a fraction of the experiences that helped reshape me. In rough chronological order, they included:

- attending professional baseball games with my grandfather, in a stadium filled with fans of every color, watching black and Latino players—Henry Aaron, Jackie Robinson, Bob Gibson, Roberto Clemente, and Juan Marichal—perform as well or better than “the Mick” or “Stan the Man” or my own favorite pitcher, Warren Spahn;

- occasionally tutoring in a dilapidated school where all the windows rattled when the trains went by—and noticing that all the students were black or brown;

- observing George Wallace and his cadre of Alabama state troopers on the platform at Notre Dame, joining the sudden rush to the door, and hearing the shouts of black athletes, the sound of their feet rhythmically crushing the roof of his car;

- reading Richard Wright and James Baldwin for the first time;

- being hurt and surprised when a close family member literally cut me out of his will when he heard that I was about to be married in a Methodist Church;

— watching the trailers of John Wayne wearing a green beret and William Calley standing trial for the massacre at My Lai and concluding that they were part of the same long-running western;

— traveling with my wife, Margaret, to Whitehall in the heart of London to renew an English residency visa and being told that it was unnecessary, that the “bog trotters” who first processed our papers in Ireland had messed up in a manner oh-so-typical of that benighted race;

— discovering that the English department at the University of Iowa had revoked Margaret’s position as a teaching assistant; as a married woman now, she could be supported by me, and her stipend could be directed to a deserving male graduate student;

— living in Winona, Minnesota with our infant son, Christopher, sharing a single position teaching college English but managing to stay only a hundred dollars above the poverty line. (We were too “rich” to qualify for subsidized housing. One winter we returned to our drafty cottage to discover the toilet bowl had frozen solid. Our son was afflicted with chronic ear infections that seriously compromised his hearing.);

— attending law school and reading the *Dred Scott* decision and *Plessy v. Ferguson* for the first time;

— going to Miami in 1980 to undertake a research project for the Select Commission on Immigration and Refugee Policy and observing the asylum interviews described in the prelude to this article;

— going to PTA meetings and teachers’ conferences at the integrated elementary school where first Christopher and, later, my other two children, attended;

— joining the Indiana University law faculty and forming deep personal relationships with black colleagues and their families;

— representing an Iraqi family for seven years in an elaborate series of INS proceedings, becoming the family members’ friends, and helping them celebrate their victory when they were finally granted political asylum;

— confronting my father’s imperfections and his troubled sexual identity and learning to come to terms with them as he grew progressively weaker and his heart failed;

— teaching sports law and immigration law to classes where minority students sometimes constituted the majority and where they almost always were willing to express themselves openly;

— taking my immigration class to a deportation hearing in Chicago and watching my Spanish-speaking students mouth the words in English as a Salvadoran woman sought to explain her situation to the court-appointed translator;

— traveling to California to visit my brother, Stephen; his Mexican wife, Letitia (now a naturalized U.S. citizen); and his two Mexican American children and to visit the overwhelmingly Latino high school in east Los Angeles where he teaches Spanish and computer science; and

—reading and becoming angered by Noel Ignatiev's *How the Irish Became White* and deciding to make a serious attempt to confront his method and argument.

B. *Race and Racism*

My own experiences confirm what science shows³³—that “race” is a slippery, ultimately arbitrary label and that “racism” is the tendency to use that label, either overtly or covertly, to justify privilege. I diverge from Kevin Johnson in my approach to the significance of such labels in two instances: when they are overt, clearly reflect the legislative will, and are affixed by law; and conversely, when the law exhibits no overt racial animus, but the animus nonetheless appears to lurk in the background, providing, for example, a barely hidden motive for legislation or the usual condition for the law's application. I will argue that the first sort of labeling, still possible in immigration law, tended historically to create more absolute racial categories than Critical Race Theory generally has recognized. I will argue that the second sort—where the label conceals rather than reveals—resists legal analysis and, therefore, is particularly difficult to eradicate.

C. *Focus and Audience*

Kevin Johnson has focused on the choices immigration scholars have raised in their selection of topics and their method of addressing those topics. He is using this issue of the *University of Illinois Law Review* as his forum for presenting his views to those scholars, minority and “mainstream.” He is also calling on them to respond. I have been accorded the privilege of using these pages to offer my own response.

Obviously, I am speaking to the same people Professor Johnson is addressing. But I make two distinctions. First, I question his sharp bifurcation between critical race scholars and theorists, on the one hand, and “mainstream immigration scholars focused on legal doctrine,” on the other. I believe that the scholarly universe is messier than this; there exists more than one branch to the “mainstream,” significant crosscurrents within the Critical Race Theory movement, and various points of confluence and convergence that sometimes bring scholars from one group or tradition into close intellectual proximity with scholars from the other. Second, the issues that his article raises transcend immigration law. I frame much of my response in terms of immigration law, taking into account, for example, the fact that immigration scholars, as a group, probably are more heavily involved with actual clients and more closely engaged with an unresponsive and decidedly unphilosophical bureaucracy

33. See *infra* notes 45–61 and accompanying text.

than are most legal academics. Yet the call—and the response—both resonate in a larger world.

D. Description and Proscriptive Norms

In their joint introduction to *Critical Race Theory: The Key Writings*, the editors, Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, indicate that one of the “common interests” of critical race theorists “is a desire not merely to understand the vexed bond between law and racial power but to *change* it.”³⁴ Richard Delgado makes a similar claim in his introduction to *Critical Race Theory: The Cutting Edge*.³⁵ In his introduction to *LatCrit: Latinas/os and the Law*,³⁶ Francisco Valdes asserts that “LatCrit theory’s second function is to be practical as well as insightful. The importance of practicality commits LatCrit theory to the advancement of transformation—the creation of material social change that improves the lives of Latinas/os and other subordinated groups.”³⁷ Here, Kevin Johnson hopes to persuade “mainstream” immigration scholars to accept the “daunting challenge of ensuring the removal of racial discrimination’s taint on the development of immigration law and policy.”³⁸

I think I understand the attraction of “activist” or “transformative” scholarship but am profoundly ambivalent about it. Most of what I have written probably has had as at least the implicit goal of changing the world. For example, I have attempted to exert intellectual pressure on the federal government to pursue a more even-handed, less ideological refugee admissions policy or to abandon ideological grounds for exclusion and deportation. Yet I have three concerns.

First, I believe that academics in every discipline—including immigration law—have the right to investigate phenomena that they find interesting, even though that investigation has no apparent moral or practical “pay off.” I believe that the “idea of the university” both shelters and benefits from such research. I find myself resisting any critique that seeks to *compel* me to “do” a certain type of scholarship or read a particular group of authors. I say this even as I acknowledge that I found the invitation to respond to Kevin Johnson’s call too appealing to resist.

Second, I believe that every explicitly “transformative” movement faces the recurrent dilemma of balancing thick, not very ideologically

34. Kimberlé Crenshaw et al., *Introduction* to *CRITICAL RACE THEORY: THE KEY WRITINGS* xiii (Kimberlé Crenshaw et al. eds., 1995).

35. Richard Delgado, *Introduction* to *CRITICAL RACE THEORY: THE CUTTING EDGE* xiv (Richard Delgado ed., 1995) (characterizing Critical Race Theory as a “challenge to racial oppression”).

36. *LatCrit: Latinas/os and the Law: A Joint Symposium by California Law Review and La Raza Law Journal*, 10 *LA RAZA L.J.* 1 (1998), 85 *CAL. L. REV.* 1 (1997).

37. Francisco Valdes, *Under Construction: Latcrit Consciousness, Community, and Theory*, 85 *CAL. L. REV.* 1, 7 (1997).

38. Johnson, *supra* note 11, at 526.

satisfying images of a complex universe against thinner, more streamlined accounts that convey the desired "message" better. Critical Race Theory, with its commitment to honest storytelling, confronts this dilemma more overtly—and I believe more honestly—than most scholarly movements. The old adage goes: "To understand all is to forgive all." Transforming the world has an appeal that forgiveness lacks. Nevertheless, I am a strong advocate of thick, morally nuanced descriptions.

Third, moral certitude, even if it is available, will not necessarily lead to the promised land. Derrick Bell's scholarship is some of the most impressive produced under the Critical Race Theory banner. Part of what makes it impressive is his refusal to flinch in the face of what he considers evidence of four hundred years of unabated, and perhaps unabatable, racism—"permanent racism."³⁹ Bell's response is to forge on, because he must:

I want to contend strongly that neither my assessment that racism is permanent, nor even Professor [Sidney] Willhelm's prediction that African American lives are at risk because of their color, is cause for either despair or surrender. Rather, these dire prognostications pose a challenge and a basis for lifetime commitment to fight against the racism that diminishes the lives of its supporters as well as its victims.⁴⁰

For those, however, who accept Bell's "dire" analysis of the problem and the need for a lifetime commitment to fight against it, the question must still remain: in what forum? It is a particularly pertinent question when presented to legal academics, who should be as much at home in the courtroom, the classroom, and the hustings as they are in the pages of law reviews.

V. THE RESPONSE: MAJOR THEMES

I find Kevin Johnson's argument attractive for several reasons. First, I subscribe to the underlying assumption that despite major changes since the 1950s, racism remains an important feature of American public life and continues to influence immigration policy and law. Second, I subscribe to the notion that society ought to treat the issue more seriously and that scholars have a role to play in exposing that racism and imagining alternatives to it. Third—as my own experiences seem to confirm—I believe that it is necessary to "see" the role that race plays in a variety of settings, including those that are apparently "neutral," before it can be confronted. I am a strong supporter of first-person

39. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 97–100 (1992) (arguing that racism is an integral, permanent, and indestructible component of American society); Derrick Bell, *The Racism Is Permanent Thesis: Courageous Revelation or Unconscious Denial of Racial Genocide*, 22 CAP. U. L. REV. 571, 571 (1993) (arguing that American racism is a stabilizing force that enables whites to bind across a wide socioeconomic chasm).

40. Bell, *supra* note 39, at 572.

storytelling as a means of creating insight—and believe that scholars in the critical race movement have been particularly effective in using highly personalized narratives to convey the continuing “reality” of racism. Fourth, I believe that the best “critical” scholarship captures the nuances of complicated situations exceptionally well and provides lucid and intellectually satisfying explanations of those situations. Fifth, by reimagining various historical and contemporary phenomena in terms of race, the best critical scholars have shifted the analytical playing field. Even when I disagree with their conclusions—as I sometimes do—I feel the need to explain *why*, to refute a strongly argued, race-based theory by demonstrating deficiencies in its “fit” with the experiential world that are not readily apparent and the better “fit” that my own “better” explanation provides.

Yet despite its substantial attractions, I also believe that Kevin Johnson’s argument is overly prescriptive. I believe that he oversimplifies the work of “mainstream” immigration scholars, undervalues the commitment that many have made to justice and racial equality, and too readily discounts a great deal of nonpolemical, but racially aware scholarship. Where he sees a “mainstream,” I see many rivulets, some of which run in directions remarkably similar to those of “critical” scholarship. Where he sees a single-minded commitment to “doctrine,” I see a considerable diversity of approaches and a clear willingness of many scholars outside the critical race movement to leave the ivory tower and confront the prejudices of the world where they live. Where he sees a field dominated by personally liberal, yet intellectually conservative “imperial scholars,” I see one that is remarkably open to new and often radical voices.

Finally, I believe that it is necessary to respond directly to one other feature of Kevin Johnson’s challenge. He asks those who do not belong to the critical race movement to do *more* than simply engage wholeheartedly in the “serious analysis of race;”⁴¹ he also asks them to engage more seriously *with* the work of race theorists.⁴² I agree. But although an engagement with critical race scholarship—and more importantly, with some of its underlying assumptions about how we recognize and begin to understand racism—is necessary both personally and professionally, such an engagement must itself be critical. Two issues particularly demand at-

41. Johnson, *supra* note 11, at 546.

42. Johnson more frequently uses the term “minority law professors.” *Id.* at 548. In the same section of his article, he also refers to “minority scholars” and “minority scholars in disciplines other than law.” *Id.* at 548 n.120. By any name, he suggests, they deserve more attention from established “mainstream” scholars.

Here, his principal targets appear to be those he believes are part of the “closed clique of [immigration] writers almost entirely dependent on self-reference and conventional means” to promote their own reputation, as well as the editors of the principal immigration casebooks. *Id.* at 548 (quoting Shie-Wei Fan, *supra* note 23, at 1228). But the remainder of the article makes it clear that he believes that “mainstream” authors more generally fail to accord minority scholars the attention they deserve.

tention: the explanatory power of overarching theory and the transformative power of legal discourse.

If “good theory” illuminates the world, it does so because its explanations account for so much of what we experience or know, establishing a new way of putting the puzzle together that uses more pieces and does not cut corners to achieve the proper “fit.” But “bad theory” does not illuminate; instead it obscures. It deals with messy facts by ignoring them—or twisting them into unrecognizable shapes. The best critical race scholarship not only forces us to confront the experience of race in America directly but also buttresses personal narrative with impressive research and honestly addresses the complications and uncertainties posed by that research. The worst critical race scholarship may display the same narrative immediacy, but it tends to overgeneralize, to offer explanations that don’t jibe with the information we already possess about the world. A fully engaged response must be willing to say that some “critical” explanations of the way race has influenced, or continues to influence, immigration policy and law are incomplete, misleading, or outright wrong.

Kevin Johnson also challenges “mainstream” scholars to do their part in “ensuring the removal of racial discrimination’s taint” that he believes continues to affect immigration law and policy.⁴³ I agree that the “taint” exists and believe that immigration scholars do positive good when they bring it to the attention of their audiences. At the very least, they provide ammunition to those who teach immigration law and seek to substantiate the claim that even facially neutral policies can hide a discriminatory subtext. They also can make converts among their tiny universe of readers, most of whom probably do teach immigration law. But “ensure” is an awfully big word. Law professors writing in law reviews have a very limited ability to “change the world.” The fact that many are practicing lawyers may well lead them to address racial questions more actively—by writing legal briefs heavy with doctrine, for example, so that a particular Palestinian or Haitian or Cuban or Guatemalan may avoid deportation—or by orchestrating communal protests against discriminatory or arbitrary treatment.⁴⁴

VI. THREE REMAINING ISSUES

A. *The Significance of the “Social Construction” of Race*

According to Donald Braman, “[i]nvestigations into race dominated nineteenth-century social science, and most theorists of the time assumed

43. *Id.* at 526.

44. Johnson has advocated using clinical programs and the insights they generate to pursue direct action of this sort. See Kevin R. Johnson & Amagda Perez, *Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory* 51 SMU L. REV. 1423 (1998).

a link between human biology, ability, character, and culture."⁴⁵ Long before "modern" experimental science emerged, however, the assumption that such a link existed already had profoundly influenced American public policy and law. Thus, as Nicholas Canny,⁴⁶ Francis Jennings,⁴⁷ and Winthrop Jordan,⁴⁸ among many others, have so ably demonstrated, the brutality that was characteristic of European colonization generally—and that played such an important role in the English conquest and resettlement of America—had its roots in theories of racial superiority already evident when the English sought to "plant" Ireland in the late sixteenth century and crossed the Atlantic with the first English "adventurers" to America in the seventeenth century.

Nevertheless, Braman's article, *Race and Immutability*, focuses on nineteenth-century racial theory, its purported "scientific" justifications, and its broad repudiation by the scientific and the legal community that began no later than 1923.⁴⁹ His article is perhaps the most thorough account of the reasons why, since the early decades of this century, the idea that physical appearance or ethnic heritage dictates ability or character has been thoroughly discredited. We can probably take it as a given that no contemporary scholar is going to claim, as the English surgeon Charles White did in 1799, that "there exist material differences in the organization and constitution of various tribes of the human species; and not only so, but that those differences, generally, mark a regular gradation,

45. Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375, 1410 (1999).

46. See Nicholas P. Canny, *The Ideology of English Colonization: From Ireland to America*, 30 WM. & MARY Q. 575 (1973); see also Nicholas Canny, *Ireland in the First British Empire*, in STRANGERS WITHIN THE REALM: CULTURAL MARGINS OF THE FIRST BRITISH EMPIRE 35–66 (Bernard Bailyn & Philip D. Morgan eds., 1991).

47. See FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST* (1975).

48. See WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550–1812* (1968); see also Winthrop D. Jordan, *American Chiaroscuro: The Status and Definition of Mulattoes in the British Colonies*, 19 WM. & MARY Q. 183, 183–86 (1962).

49. See Braman, *supra* note 45, at 1404–06 (discussing the background and rationale of the Supreme Court's opinion in *United States v. Thind*, 261 U.S. 204 (1923)). In *Thind*, the Supreme Court decided to dismiss racial science, in part because "[t]he various authorities are in irreconcilable disagreement as to what constitutes a proper racial division." *Id.* at 212. Discussing this "irreconcilable disagreement," Braman tells us that the Court "nodd[ed] to a theory that is not far from contemporary understandings of human biodiversity." Braman, *supra* note 45, at 1406. More specifically, the Court found that:

The explanation [of the difficulties of arriving at "scientific" agreement] probably is that "the innumerable varieties of mankind run into one another by insensible degrees," [and] to arrange them in sharply bounded divisions is an undertaking of such uncertainty that common agreement is practically impossible.

Thind, 261 U.S. at 212 (quoting 13 ENCYCLOPEDIA BRITANNICA 502 (11th ed. 1913)).

As Braman notes, another reading of *Thind* and its immediate predecessor, *Ozawa v. United States*, 260 U.S. 178 (1922), is possible: "Certainly it can be (and has been) argued that the Court's development of a legal conception of race in these cases stands as a confounding of both science and history to suit a racist agenda." Braman, *supra* note 45, at 1409 & n.132 (citing Ian Haney López, *The Prerequisite Cases*, in RACIAL CLASSIFICATION AND HISTORY 53 (E. Nathan Gates ed., 1997); Mark S. Weiner, *Immigration and Naturalization Law: Some Empirical Observations*, 10 YALE J.L. & HUMAN. 657, 658 (1998)).

from the white European down through the human species to the brute creation.”⁵⁰

The furor attending the publication of *The Bell Curve*⁵¹ a decade ago indicates that even more limited claims, such as the assertion that human intelligence is inherited and that significant statistical variations exist between racial groups in America, are automatically suspect. Much of the suspicion undoubtedly stems from concerns about the political uses to which such assertions are likely to be put. But some also stems from the inherent unreliability of “race” as a classifying device and its Procrustean tendency to wedge people of demonstrably different ancestry, different physical characteristics, and different genetic profiles into a few rigid categories—and to ignore cross-categorical similarities.⁵² Noel Ignatiev thus expressed a common—and, it appears, easily defended—opinion when he wrote:

No biologist has ever been able to provide a satisfactory definition of “race”—that is, a definition that includes all members of a given race and excludes all others. Attempts to give the term a biological foundation lead to absurdities The only logical conclusion is that people are members of different races because they have been assigned to them.⁵³

In a sense, Braman’s article is “the last word” on the subject, a careful recapitulation of arguments that have been made, developed, tested, and modified over the course of the twentieth century. Yet in another sense, there can be no “last word.” A major part of the Critical Race Theory project always has been to deconstruct race, to demonstrate that it is a social rather than a biological construction—something that isn’t really a fact but instead is an empty name, imprecise, changeable, and easily manipulated to marginalize particular groups of people who really are being victimized for other reasons. As long as society at large contin-

50. REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM 50 (1981) (quoting CHARLES WHITE, ACCOUNT OF THE REGULAR GRADATION OF MAN 83 (London, Dilly 1799)).

51. RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE* (1994).

52. The genetic evidence has proven to be particularly powerful, since it directly counters the idea—that served as the cornerstone of chattel slavery and, later, of de jure racial segregation—that race is somehow “inherited” or “passed on” from one generation to the next. For example, Braman reports:

In 1972, population biologist Richard Lewontin of Harvard University, analyzing seventeen genetic markers in 168 populations as diverse as Austrians, Thais, and Apaches, found that there was greater genetic difference within each race than between races, demonstrating that racial distinctions were biologically arbitrary. A series of studies [subsequently undertaken] would confirm and expand upon [early works, such as Lewontin’s], providing not only a better understanding of human biodiversity, but a substantial move away from the popular terms of racialism.

Braman, *supra* note 45, at 1428.

53. IGNATIEV, *supra* note 2, at 1. For a brilliant study of the process of “assignment” in the legal arena, see IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996). Haney López takes as his subject the historical racial prerequisite to naturalization, legal identification as a “white person.” *Id.* at 37–47. Analyzing a series of cases decided in state and federal courts over a period of more than fifty years, he demonstrates how result-oriented and unscientific racial categorization in the hands of state and federal judges proved to be. *See id.* at 49–77.

ues to use racial classifications as if they were real, those subject to those classifications will continue to challenge the validity of the classifying process—and the motives of those who employ it.⁵⁴

Two key—and closely related—concepts in the critical race literature are the “one drop of blood rule” and “passing.” The one drop of blood rule “provides that an individual with any level of black ancestry, even as little as ‘one drop,’ must be classified as black.”⁵⁵ “Passing” is not so exclusively restricted to African Americans. Thus, Kevin Johnson applies the concept to light-skinned Latinos like himself and his brother—native speakers of English who can “choose” to join “Anglo” society.⁵⁶ More commonly, however, the term has been applied to describe movement across the traditional black-white “color line.”⁵⁷ Although traditionally the term resonated with the idea of imposture—even “bad faith”—it has in large measure been redefined by critical race scholars as a point of reference from which to criticize the very concept of a “color line.” Alex Johnson has made this point explicitly:

54. See Derrick Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893. Professor Bell writes:

For the past three or four months, a great deal of attention and energy has been devoted to commending and condemning Mr. Charles Murray and the late Dr. Richard Herrnstein, authors of the best-selling book on racial intelligence, *The Bell Curve*. This book suggests great social policy significance in the fact that black people score, on average, fifteen points below whites on I.Q. tests.

This thesis has been criticized as the rehashing of views long-ago rejected by virtually all experts in the field. There is, critics maintain, no basis for finding that intelligence is inherited and, indeed, no accepted definition of the vague term “intelligence.” There is, on the other hand, a depressingly strong and invariant correlation between resources and race in this country and resources and success—including success in taking I.Q. tests. These are settled facts.

....

Criticism of *The Bell Curve* has been so universal among biologists that one must wonder: Why did these two well-known men produce a book full of rejected theories?

Id. at 893–94. One need not agree with Professor Bell’s sweeping assertion about what the “settled facts” are to appreciate his continuing need to recapitulate the argument.

55. Alex M. Johnson, *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CAL. L. REV. 887, 888 n.6 (1996). Johnson cites as historical authority for the genesis of the “one drop of blood” rule Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2110 (1993).

56. Johnson, *supra* note 3, at 223–24.

57. See Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 268–69 (1995).

The actual skin colors of Americans, of course, have always ranged over a broad continuum of lightness and darkness. But the social notions of whiteness and blackness have never been regarded as points along such a continuum. Rather, for most Americans—the notable exceptions being peoples who were here before any European immigrants arrived, immigrants from Asia and Mesoamerica, and the progeny of both groups—the social world was sharply divided into two racial categories. “Passing for white” meant that a person had moved from one side of this binary division to the other—but the assumption remained that he or she was really black, and just got away with a racial imposture.

Id.; see also Alfreda A. Sellers Diamond, *Becoming Black in America: A Book Review Essay of Life on the Color Line by Gregory Howard Williams*, 67 MISS. L.J. 427, 431 n.21 (1997) (“‘Passing’ is a common way for African-Americans of very light skin color to alter their identity and transfer to the white community.”) (citing VIRGINIA R. DOMINGUEZ, *WHITE BY DEFINITION* 161 (1986)); Johnson, *supra* note 55, at 919 n.125 (1996) (defining “passing” as “a situation where a black individual, due to her light pigmentation, appears white and therefore may ‘pass’ for white in American society despite the ‘one drop’ rule”).

The "one drop" rule allowed whites to preserve the mark of whiteness by excluding from that classification all individuals who had less than 100% white heritage. At one time, when blacks were viewed as less human and less deserving of rights, this rule may have been efficient and appropriate to protect the white consuming public from deception. To allow blacks to classify themselves as whites would work a fraud on the public, thereby undermining the notion of whiteness as a superior mark or product.

This is perhaps the reason that "passing" was viewed so harshly by whites at the time when racial differences were reified and legalized. The phenomenon of passing had the effect of undermining the mark of whiteness. It allowed blacks to produce a product, a visibly white person when viewed phenotypically, that had the effect of undermining the product of whiteness, which was defined as the absence of blackness or any black ancestors. In a world in which passing existed liberally, the ultimate outcome would be the denigration of whiteness as a product because whites could no longer claim that they were different or distinct from blacks if (1) they could be produced by black parents or (2) if they could not be differentiated from the offspring of black parents.

In effect, if the "one drop" rule did not exist and racial categories were instead based exclusively upon phenotype and the rule of recognition, so that if one looks white one is classified as white irrespective of one's parentage or heritage, this would almost completely destroy the allegedly superior mark of whiteness.⁵⁸

A similar perception of the artificiality of the traditional "color line" lends considerable force to the biographical and autobiographical stories told by Cheryl Harris⁵⁹ and Judy Scales-Trent,⁶⁰ among others, in recent years.⁶¹

The attempt to deconstruct race strikes me as an important and worthy goal. Yet I have two reservations. First, to insist that race is a social construction does not get us very far. Banishing biology from the mix is an important first step—but it is only that, a first step. We still must consider why racial categories resist change and must examine the ways that they not only help shape the law but also are themselves shaped by law. Second, stories of oppression, resistance, and choice help us to understand the role that racism has played in society and will convert some of those who read or listen to the "cause" of a society that does not dis-

58. Johnson, *supra* note 55, at 919–20; see also Bell, *supra* note 54, at 904–07 (retelling and interpreting the story Cheryl Harris told about her grandmother's "passing" in Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1710–12 (1993)).

59. See Harris, *supra* note 58, at 1710–12.

60. See JUDY SCALES-TRENT, *NOTES OF A WHITE BLACK WOMAN* (1995); Judy Scales-Trent, *Commonalities: On Being Black and White, Different, and the Same*, 1990 YALE J.L. & FEMINISM 305 (1990).

61. For other such accounts, see generally *PASSING AND THE FICTIONS OF IDENTITY* (Elaine K. Ginsberg ed., 1996).

criminate against migrants or any other disempowered minority. But translating such awareness into constructive legal change—transforming the fundamental institutions of society, if you will—is an immensely difficult task, not only from a practical level but also from a theoretical one.

B. *Experience, Stories, Policy, and Law*

In his introduction to *Critical Race Theory: The Cutting Edge*, Richard Delgado tells us:

Critical Race Theory's challenge to racial oppression and the status quo sometimes takes the form of storytelling, in which writers analyze the myths, presuppositions, and received wisdoms that make up the common culture about race, and that invariably render blacks and other minorities one-down. Starting from the premise that a culture constructs social reality in a way that promotes its own self-interests (or that of elite groups), these scholars set out to construct a different reality. Our social world, with its rules, practices, and assignments of prestige and power, is not fixed; rather, we construct it with words, stories, and silence. But we need not acquiesce in arrangements that are unfair and one-sided. By writing and speaking against them, we may hope to contribute to a better, fairer world.⁶²

Derrick Bell tells us that “[c]ritical race theory writing and lecturing is characterized by frequent use of the first person, storytelling, narrative, allegory, interdisciplinary treatment of law, and the unapologetic use of creativity.”⁶³ According to Bell, “[t]he narrative voice, the teller, is important to critical race theory in a way not understandable by those whose voices are tacitly deemed legitimate and authoritarian. The voice exposes, tells and retells, signals resistance and caring, and reiterates what kind of power is feared most—the power of commitment to change.”⁶⁴

Implicit in what Delgado and Bell are writing are two propositions: that those who have been, or presently are, subordinated can offer a counterdiscourse, a retelling of familiar tales from another perspective capable of piercing the comfortable armor of complacency worn so lightly by “majority” listeners; and that such stories can not only signal a “commitment to change” (Bell)⁶⁵ but, perhaps, a “contribut[ion] to a better, fairer world” (Delgado).⁶⁶ The lever for such change is the “persuasive power” of narrative:

There is great persuasive power in narrative. Sara Lawrence Lightfoot locates the source of this power in the story's ability to in-

62. Delgado, *supra* note 35, at xiv.

63. Bell, *supra* note 54, at 899.

64. *Id.* at 907.

65. *Id.*

66. Delgado, *supra* note 35, at xiv.

spire feelings of commonality and connectedness among tellers, listeners, and subjects of stories: "[S]tories express depth and complexity. They allow for ambiguity, multiple interpretation, and refracted images. The reader or listener can be convinced and moved, by intellect and emotion. And stories are not exclusive property. One story invites another as people's words weave the tapestry of human connection."⁶⁷

One story invites another. I believe that the first proposition—the possibility of communication—can be demonstrated by recounting a personal experience fairly typical, I think, of immigration scholars. Reading or listening can change the perspective of the reader or listener. Yet the same story also casts skeptical light on the second proposition—the possibility of instrumental change. It does not demonstrate that such change is impossible, but it does show that the law resists modification when experiences enter the courts and that even sympathetic judges find it difficult to reverse policies supported by facially neutral laws.

Nearly twenty years ago, Gil Loescher and I began work on a project that, seven years later, produced *Calculated Kindness*,⁶⁸ our history of U.S. refugee policy and law. Our training and experiences affected our approach. Gil is a former seminarian. When I first met him, he was a young, untenured member of the political science faculty at Notre Dame. He was passionately committed to the cause of human rights and had already begun to look closely at the ways that institutions—particularly international humanitarian institutions, such as the Office of the United Nations High Commissioner for Refugees (UNHCR) and the International Red Cross—worked to alleviate suffering. I had entered law school six years earlier with a Ph.D. in English and fresh memories of the various humiliations experienced by my wife and myself as we attempted to secure permanent teaching positions in the cutthroat academic market of the early 1970s. We seemed powerless to guarantee our future or fend off the petty injustices so common in the lives of untenured and part-time faculty members. I believed then that going to law school could only help. I wasn't exactly sure how. I had an uncle of sorts who was a lawyer and made a good living, but I had never been particularly close to him or interested in his work. Getting a law degree seemed to be the easiest way to gain power.

Law school confirmed what Henry Kissinger's career had already demonstrated: the law does not provide remedies for every wrong. But two summers spent as a law clerk working for the state of New Jersey introduced me to the ways that institutions use the law to promote their ends—good, bad, or indifferent. I drafted papers to shut down dangerous

67. Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2279 (1992) (quoting Sara Lawrence Lightfoot, Balm in Gilead: On Love, Justice and the Word, Address Before the Equal Rights Advocates (June 15, 1988)).

68. GIL LOESCHER & JOHN A. SCANLAN, *CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT* (1986).

carnival rides and to force a contractor to pay the prevailing wage—and also to deprive a Rutgers student of the opportunity to sue the state for the damage inflicted on his car in a state-owned parking garage. I was part of the team that tried to convince the Supreme Court that the state had no obligation to “deinstitutionalize” its mental patients.

I completed law school at Notre Dame and stayed on at the Center for Civil and Human Rights. When Father Theodore M. Hesburgh, the long-time president of Notre Dame, was appointed by President Carter to head the United States Select Commission on Immigration and Refugee Policy, he asked the Center for help. Gil and I provided it.⁶⁹

Our mission appeared to have little or nothing to do with race. Instead, it addressed the history of U.S. refugee admissions policy, the government’s response to the massive Indochinese migration that was then occurring, its concurrent response to the Cuban-Haitian refugee “crisis” just beginning to unfold, and the adequacy of the newly enacted Refugee Act to deal with these and other emergencies. We tried to determine how policy had been made; whether it reflected explicit or implicit goals; whether those goals had been met; and if not, whether the problem was with the goals themselves or the means chosen to accomplish them. Much of what we read was heavily larded with statistics, generalizations, and the impersonal language so common in statutes and governmental reports. Most of those we interviewed were employed by the State Department, the INS, UNHCR, state and local governments, and the private voluntary organizations that played a major role assisting and resettling refugees. Many gave us careful answers that presented the “official” positions of their respective organizations. We evaluated that information and used it in the reports we submitted to the Select Commission and in articles we published together and separately.⁷⁰ My first law re-

69. See, e.g., STAFF OF SELECT COMM’N ON IMMIGRATION AND REFUGEE POLICY, *ADMISSION OF REFUGEES AND ASYLEES UNDER THE LAW: REPORTS ON CURRENT U.S. PROCEDURES AND POLICIES AND THEIR ORIGINS* (1980), *partially reprinted in HOUSE & SENATE COMMS. ON THE JUDICIARY, 97TH CONG., U.S. IMMIGRATION POLICY AND THE NAT’L INTEREST* 153 (Joint Comm. Print 1981). Sharon O’Brien, another political scientist, participated in two studies the Center conducted that examined the ways that U.S. immigration law affected North American Indians. All of us benefited from the assistance of graduate students and law students.

70. See, e.g., GILBERT D. LOESCHER & JOHN A. SCANLAN, *U.S. FOREIGN POLICY AND ITS IMPACT ON REFUGEE FLOW FROM HAITI* (Center for Latin American and Caribbean Studies, New York University, Occasional Paper No. 42, 1984); JOHN A. SCANLAN & GILBERT D. LOESCHER, *REFUGEES, POWER POLITICS, AND THE INTERNATIONAL REFUGEE REGIME: THE CASE OF U.S. TREATMENT OF CARIBBEAN BASIN REFUGEES* (Center of International Studies, Princeton University, World Order Studies Program, Occasional Paper No. 14, 1985); Gilbert Loescher & John Scanlan, *Human Rights, U.S. Foreign Policy, and Haitian Refugees*, 26 J. INTERAMERICAN STUD. & WORLD AFF. 313 (1984); G.D. Loescher & John Scanlan, ‘Mass Asylum’ and U.S. Policy in the Caribbean, 37 WORLD TODAY 387 (1981); John A. Scanlan & G.D. Loescher, *Mass Asylum and Human Rights in American Foreign Policy*, 97 POL. SCI. Q. 39 (1982); John A. Scanlan, *Asylum Adjudication: Some Due Process Implications of Proposed Immigration Legislation*, 44 U. PITT. L. REV. 261 (1983); John A. Scanlan, *Immigration Law and the Illusion of Numerical Control*, 36 U. MIAMI L. REV. 819 (1982); John A. Scanlan, *Regulating Refugee Flow: Legal Alternatives and Obligations Under the Refugee Act of 1980*, 56 NOTRE DAME LAW. 618 (1981), *reprinted in* 5 IMMIGR. & NATIONALITY L. REV. 157 (1982); Gilbert Loescher & John Scanlan, *Preface to ANNALS AM. ACAD. POL. & SOC. SCI.*, May

view articles perhaps were not as "doctrinal" as Kevin Johnson believes most "mainstream" scholarship to be—but they were likely as "juiceless."

Yet some of the things that we read and heard then, and with increasing frequency in the years that followed after we had begun work on our book, were considerably more heartfelt. Most dealt with the sufferings of refugees and with the frustrations of those who confronted political obstacles while attempting to alleviate that suffering. For example, a former commissioner of immigration dispatched by President Truman to Europe in 1945 "to inquire into the conditions and needs of displaced persons in Germany who may be stateless or nonrepatriable, particularly Jews," conducted his inquiry and then responded: "We appear to be treating the Jews as the Nazis treated them except that we do not exterminate them."⁷¹ Thirty-six years later, President Ronald Reagan "issued an executive order directing the United States Coast Guard to intercept boats laden with Haitians sailing in the general direction of the United States and tow them back to Port-au-Prince."⁷² This marked the beginning of the so-called Haitian interdiction program, which, despite significant outcry and legal challenges, remained essentially intact for a dozen years—and continues to this day.⁷³ When Poul Hartling, the commis-

1983, at 9; John Scanlan & Gilbert Loescher, *U.S. Foreign Policy, 1959–80: Impact on Refugee Flow from Cuba*, ANNALS AM. ACAD. POL. & SOC. SCI., May 1983, at 116; John A. Scanlan, *Who Is a Refugee? Procedures and Burden of Proof Under the Refugee Act of 1980*, in 5 IN DEFENSE OF THE ALIEN 23 (Lydio F. Tomasi ed., 1983).

71. Displaced Persons in Germany: Letter from President Truman to General Eisenhower (transmitting report of Earl G. Harrison) (Aug. 31, 1945), in U.S. DEP'T ST. BULL., Sept. 1945, at 45, 455; Report of Earl G. Harrison, *reprinted* in U.S. DEP'T ST. BULL., Sept. 1945, at 456, 461. For additional material quoted from both documents, see LOESCHER & SCANLAN, *supra* note 68, at 4.

72. LOESCHER & SCANLAN, *supra* note 68, at 188 (citing Exec. Order No. 12,324, 46 Fed. Reg. 48, 109 (1981)).

73. For a good summary of the Haitian interdiction program up to 1993, see Keith Highet et al., *Aliens-Interdiction of Haitians on High Seas-Definition of "Return" Under U.S. Statute-Extraterritorial Effect of Statute*, 88 AM. J. INT'L L. 114 (1994).

The interdiction program was the result of a bilateral agreement entered into between the United States and Haiti, then ruled by Jean-Claude Duvalier However, the bilateral agreement, Executive Order No. 12,324 and the Immigration and Naturalization Service's Guidelines . . . promulgated to effectuate the interdiction program all provided that those who were accorded political refugee status would not be returned to Haiti. Pursuant to the INS Guidelines, Haitians interdicted on the high seas were to be interviewed at sea to determine if they were political refugees with a credible fear of persecution. If a refugee was found to have a credible fear of persecution, he would be "screened in" and permitted to enter the United States to apply for political asylum. The others were "screened out" and repatriated to Haiti. Later, in November 1991, the United States opened the [military] base at Guantanamo Bay, Cuba, for the purpose of interviewing interdictees.

On May 24, 1992, President George Bush, by Executive Order No. 12,807 (Kennebunkport Order) [57 Fed. Reg. 23,133 (1992)], terminated the screening process and allowed the Coast Guard to interdict Haitians on the high seas and immediately return them to Haiti without making any determination as to their political refugee status.

Id. at 114–15.

The Haitian Refugee Center, Inc. (HRC) and the Haitian Centers Council, Inc. (HCC), nonprofit organizations assisting Haitian immigrants, brought class actions in federal court challenging the Kennebunkport Order and other aspects of the interdiction program on a number of grounds, including alleged violation of Article 33 of the 1951 Convention Relating to the Status of Refugees and INA

sioner of UNHCR, initially refused to take up the matter forcefully with the U.S. government, his refusal "provoked a storm of protest in the ranks of the UNHCR."⁷⁴

Time and again, Gil and I heard stories from those we were interviewing about the ways that geopolitical concerns and big-power politics hampered the delivery of aid and the process of resettlement. Only occasionally did we hear from migrants themselves, something I now regret. When we did hear from them, they forced us to confront policy and law at a deeper, more immediate level—and invited us to see traces of racism where before we had seen only ordinary Hobbesian politics.

A few words about those politics before I discuss that "invitation:" Gil and I had been led by our reading and our interviews to notice the glaring disparity between the treatment of Cuban and Haitian migrants by the Department of State and the INS. I believed then—and I still believe now—that American refugee policy had been shaped in large measure by the ideological struggle between east and west and by the nation's consequent willingness to weigh the mistreatment that communist regimes inflicted on their own nationals much more heavily than the mistreatment that right-wing regimes inflicted. Russians, Poles, Hungarians, Vietnamese, Cambodians, and Laotians—even Nicaraguans fleeing Daniel Ortega's Sandinista regime—generally were presumed to be refugees. The fact that they had lived in a socialist state and had fled es-

§ 243(h)(1), 8 U.S.C. § 1253(h)(1), which barred the "refoulement" or forcible "return" of aliens whose life or safety was threatened on account of race, religion, nationality, or political opinion. The HRC's case, which initially was brought before the Kennebunkport Order was issued, reached the Eleventh Circuit three times but proved unsuccessful. See *Haitian Refugee Center, Inc. v. Baker*, 949 F.2d 1109 (11th Cir. 1991); *Haitian Refugee Center, Inc. v. Baker*, 950 F.2d 685 (11th Cir. 1991); *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498 (11th Cir. 1992). The HCC fared better in the Second Circuit. See *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1350 (2d Cir. 1992). However, the Supreme Court, in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), determined that neither the interdiction program nor the Kennebunkport Order violated U.S. or international law.

When the Clinton administration took office, it continued the interdiction program and the direct return of boat people to Haiti without the benefit of an opportunity to apply for asylum. See Office of the Press Secretary, The White House, *Statement by George Stephanopolous* (Mar. 2, 1993) <<http://www.inform.umd.edu/EdRes/Topic/US+W/US/Agencies/Exec/WHouse/Speeches/1993/March/haitian-asylum>> (on file with the *University of Illinois Law Review*). The Clinton administration temporarily suspended the forcible return of Haitians during the unrest associated with the coup that temporarily unseated President Jean-Bertrand Aristide but after participating in the multinational military effort to restore Aristide to office, resumed the practice again in December 1994. See S.C. Res. 940, U.N. SCOR, 49th Sess., 3413d mtg., U.N. Doc. S/RES/940 (1994); see also National Coalition for Haitian Rights, *Expanding Effectiveness Despite the Odds: A Progress Report of NCHR Activities in 1995* <<http://www.nchr.org/mnd/1995.htm>>.

As amended by the Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, § 604(a), 110 Stat. 3009-546, 3009-690, 8 U.S.C. § 1158(a)(1) provides that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum." 8 U.S.C. § 1158(a)(1) (Supp. II 1996). The statute is conspicuously silent, however, about the right to apply for asylum if the "interdicted" alien is not brought to the United States.

74. LOESCHER & SCANLAN, *supra* note 68, at 194 (quoting *Refugee Law Violated*, GUARDIAN (Manchester, England), Dec. 10, 1981).

tablished that they had been persecuted—or would be if they were forced to return. No such presumption ordinarily was afforded to those who fled other types of regimes, however brutal they ordinarily were. Salvadorans, Guatemalans, Chileans, Ethiopians, Somalians—even Nicaraguans fleeing Anastasio Somoza's despotic regime—generally were not granted conditional permanent resident status or parole (a term provided by the law in effect until 1980) or granted asylum or offered special refugee visas (as provided by the Refugee Act of 1980).⁷⁵ Only when substantial political pressure was brought would some of these unfortunate people be granted temporary relief from deportation ("extended voluntary departure" under pre-1994 law; "temporary protected status" under new provisions adopted that year). Most, however, would be turned away at the border—and if they entered illegally or overstayed their visas, would be deported. Deportation as the norm, we believed, was the natural consequence of treating immigration as a zero-sum game, in which it was assumed (often without much analysis) that only a limited number of "admissions" could be offered before the presence of too many migrants destabilized the polity.

We recognized that many of those customarily turned away were black. But we also recognized that many of those admitted were Asian or Hispanic.⁷⁶ We knew that American willingness to welcome Cubans as refugees was firmly grounded in cold war politics. We believed that American unwillingness to accept Haitians as refugees was, in large measure, simply the other side of the same political coin.

In some sense it was. Yet the invitation that experience extended—one that I did not fully recognize or accept—was to examine the coin more closely and observe that it was not necessarily symmetrical. Strong political reasons could prompt the immigration bureaucracy to ignore race in particular situations or place it on the back burner. But in the ab-

75. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.).

76. During the first years after the passage of the Refugee Act of 1980, Asian refugees were granted the great majority of visas made available under the annual presidential determinations mandated by section 207. Migrants from Central America and the Caribbean were allocated far fewer visas but arrived on American shores in substantial numbers seeking asylum. In November 1983, James Fallows reported:

In 1980, at least 125,000 Cubans and Haitians arrived in southern Florida and were admitted as "special entrants," a category invented to cope with the influx. Since 1975, the U.S. has accepted over half a million refugees from Indochina. More than 160,000 came in 1980 alone, which together with the Cubans and Haitians pushed that year's total for legal admissions to 808,000, the highest in sixty years.

James Fallows, *Immigration: How It's Affecting Us*, ATLANTIC MONTHLY, Nov. 1983, at 45–68, 85–106, available in <<http://www.theatlantic.com/politics/immigrat/fallowf.htm>>.

Presidential Determination No. 83-11, issued shortly before Fallows published his article, established a "ceiling" of "72,000 worldwide refugee admissions" for fiscal year 1984. These "were allocated among the regions of the world as follows: 50,000 for East Asia; 12,000 for the Soviet Union/Eastern Europe; 6,000 for the Near East/South Asia; 3,000 for Africa; and 1,000 for Latin America/Caribbean." T. ALEXANDER ALENIKOFF ET AL., IMMIGRATION PROCESS AND POLICY 624 (1985).

Anticommunist refugee policies also favored Russian Jews—a group that was the target of vicious racial stereotyping before and during the era of "national origins quotas."

sence of those reasons, an underlying racism could help account for differential treatment. We were given our first clues when we interviewed those working on behalf of the Haitians in Miami and New York. Most were white, and many were lawyers—a fact that I believe has significance. They told us that the Haitians' skin color, accents, and poverty subjected them to discrimination by Anglos, Latinos, and other dark-skinned minorities.

Judge James L. King gave us another clue in *Haitian Refugee Center v. Civiletti*.⁷⁷ In that opinion, he noted:

Those Haitians who came to the United States seeking freedom and justice did not find it. Instead, they were confronted with an Immigration and Naturalization Service determined to deport them. The decision was made among high INS officials to expel Haitians, despite whatever claims to asylum individual Haitians might have. A Program was set up to accomplish this goal. The Program resulted in wholesale violations of due process, and only Haitians were affected.⁷⁸

Judge King explicitly contrasted the treatment afforded the Haitians with that accorded the Cubans and suggested the disparity had a racial cast:

The plaintiffs are part of the first substantial flight of *black* refugees from a repressive regime to this country. All of the plaintiffs are black. . . . Prior to the most recent Cuban exodus, all of the Cubans who sought political asylum . . . were granted asylum routinely. None of the over 4,000 Haitians processed during the INS "program" at issue in the lawsuit were granted asylum. No greater disparity can be imagined.⁷⁹

But perhaps the most important clue manifested itself when I visited the INS processing center in Liberty City and observed the parallel, yet very different processing methods of Cuban and Haitian "boat people" detailed in the prelude to this article. The Cuban man and the Haitian woman were both desperately poor. They both sought an identical benefit— asylum— available only to those who demonstrate a "well-founded fear of persecution" on account of race, religion, nationality, or ethnic origin; political activity or political opinion; or membership in some group— such as a trade union— that put them at risk.⁸⁰ The statute does not grant asylum on the basis of poverty. Those administering it have always been particularly suspicious of third-world applicants and particularly receptive to applicants from Europe. The race of the applicant is

77. 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd in part and rev'd in part sub nom.* *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982).

78. *Id.* at 532.

79. *Id.* at 451.

80. INA § 208, 8 U.S.C. § 1158 (1994) (providing the discretionary grant of "asylum" to persons who meet the statutory definition of refugee). The statute defines a refugee as a person "unwilling" or "unable" to return home "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 1101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

not a statutory criterion for granting asylum or denying it. But the applicant's credibility is an issue, as is whatever evidence the applicant can present⁸¹ indicating that he has been "singled out" for persecution because he possesses a characteristic protected by the statute.⁸² Some applicants arrive with travel documents; most arrive with only their stories. Somehow, "white" Europeans almost always manage to tell more convincing stories than do "black" or "brown" people from Africa, the West Indies, or Central America. Under other circumstances, the coffee-colored Cuban man and the darker Haitian woman, both of whom arrived from islands in this hemisphere, might have provoked similar INS suspicions. After all, neither explained the "persecution" the act requires they demonstrate. Indeed, the Cuban man, with his clear intention of joining his family in the United States, spoke at cross-purposes to the statutory requirement. In contrast, the Haitian woman's misery was palpable—and still open to any interpretation as to what had caused it.

Why then the disparate treatment? Cold war politics certainly played a part. Southern Florida politics also played a part; originally, members of the politically influential Cuban community in Miami were ferrying the "Marielitos" to the mainland.⁸³ But the disparity not only involved a relaxation of ordinary immigration standards when a large influx of Cubans reached U.S. shores in 1980 but also involved a tightening of those standards that had begun more than two years earlier when a much smaller Haitian influx began. As Judge King wrote in the *Haitian Refugee Center* case, "[m]ost Cuban refugees were not processed under 8 C.F.R. § 108 [the predecessor to today's 8 C.F.R. § 208] because of special presidential and congressional action. However, all those who were processed in individual proceedings under 8 C.F.R. § 108 did receive asylum."⁸⁴ In contrast, Haitians were subjected to a unique program intended to deny them any real opportunity to obtain asylum. They were not only denied special congressional intervention but also the opportunity to be heard with their attorneys present.⁸⁵ This and similar govern-

81. This was true in the early 1980s and is still true today, although considerable uncertainty about the alien's burden of demonstrating probable or merely possible persecution was resolved in *INS v. Cardozo-Fonseca*, 480 U.S. 421 (1987). For the current regulations relating to the provision of information, conduct of the hearing, evidence, and burden of proof, see 8 C.F.R. §§ 208.9, 208.12, and 208.13.

82. This requirement was always implicit in the statute. It was interpreted restrictively in *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

83. See LOESCHER & SCANLAN, *supra* note 68, at 182–84. At the peak of the Mariel crisis, in April 1980, "over 1500 boats manned by Cuban-Americans were standing off Mariel harbor waiting to take on Cuban emigrés." *Id.* at 184.

84. *Civiletti*, 503 F. Supp. at 451 n.1.

85. *See id.* at 460 n.33.

Cause of action 3 alleges that immigration judges permitted INS to schedule deportation hearings simultaneously or in rapid succession with each other and with independent asylum interviews before the District Director. Again, the alleged cumulative effect of this practice was to deprive the class of a fair hearing with the assistance of counsel and other due process rights.

Id.

mental behavior⁸⁶ prompted Judge King to conclude: "One central issue, however, overshadows this entire case: unlawful discrimination. The plaintiffs charge that they faced a transparently discriminatory program designed to deport Haitian nationals and no one else. The uncontroverted evidence proves their claim."⁸⁷

Reading transcripts and depositions and listening to the testimony of INS officers, government lawyers, and Haitian "boat people" convinced Judge King that racial animus, and not simple cold war politics, played the key role in determining the government's response. To conclude this, of course, at least implicitly he had to conclude that sometimes the government favors some nonwhite people over others, that not all potential victims of discrimination always are going to be perceived as equally far down the ladder, or—in Derrick Bell's terms—as "faces at the bottom of the well."⁸⁸

Two years later, the Fifth Circuit decided the appeal. It accepted Judge King's factual findings and asserted:

Recognizing the existence of an entitlement in the right to petition for political asylum does not define the particulars of what the government may or may not do in making a decision on that petition. Mindful of the Supreme Court's admonition that courts ought not impose constitutional restraints which would inhibit the ability of the political branches to respond through immigration policy to changing world conditions, we hold simply that the government violates the fundamental fairness which is the essence of due process when it creates a right to petition and then makes the exercise of that right utterly impossible.⁸⁹

The Fifth Circuit found that the district court had acted correctly in requiring the INS to modify its procedures:

We therefore find sufficient legal warrant under the Fifth Amendment for that part of the district judge's order requiring the government to submit a procedurally fair plan for the orderly reprocessing of the plaintiffs' asylum applications.⁹⁰

And in a pregnant footnote, the court found:

that the district court properly exercised its jurisdiction under 8 U.S.C. § 1329 to order the government to submit a reprocessing plan which adheres to INS regulations and operating procedures. Whether or not these procedures are mandated by the due process

86. For example:

[T]he Haitians "come here with the expectation that they should reach a land of freedom. What they found was an Immigration Service which sought to send them back to Haiti without any hearing by an immigration judge on their asylum claims, and a systematic program designed to deport them irrespective of the merits of their asylum claims.

Id. at 451 (citations omitted).

87. *Id.*

88. BELL, *supra* note 39.

89. Haitian Refugee Ctr. v. Smith, 678 F.2d 1023, 1039 (5th Cir. Unit B 1982).

90. *Id.* at 1041.

guarantee, it is clear at least that agency deviation from its own regulations and procedures may justify judicial relief in a case otherwise properly before the court.⁹¹

Having cleared the decks, the Fifth Circuit thus established a clear field of fire. Its target was Judge King's "sweeping" and, according to the court, unnecessary conclusions about the denial of equal protection:

The district court undertook to analyze an equal protection claim upon appellees' contention that the Haitians were victims of unlawful discrimination on the basis of national origin. In view of our conclusions announced above, a resolution of the issue is unnecessary. If there be an equal protection component to this situation it would appear in the ad hoc action of INS officials in formulating and implementing, on their own, a special plan altering what has been provided by Congress and by regulation for all aliens seeking asylum, the altered rights and duties being made applicable by the INS only to aliens of a particular national origin while the lawfully mandated procedures remain applicable to all other aliens seeking asylum. We have found that these actions denied appellees at least a valuable right—created by law—without due process, and we do not address the equal protection contentions any more than to observe that we do not approve the sweeping conclusions of the district court.⁹²

The Fifth Circuit's decision established the judicial template for dealing with all future Haitian claims: deal with due process claims, if the government's actions prove not to be immunized by the plenary power of Congress and the executive branch to establish and execute immigration policy, but reduce every equal protection claim or assertion of racial discrimination to an unauthorized departure by lower-level immigration officials from neutral regulations. The capstone case, *Jean v. Nelson*,⁹³ was decided three years after the Fifth Circuit *Haitian Refugee Center* case. *Jean* involved Haitians who had been apprehended before formally entering the United States and, as the Immigration and Nationality Act then read, were, therefore, subject to "exclusion" rather than "deportation."⁹⁴ Regulations permitted the indefinite incarceration of aliens pending their exclusion hearings. Other regulations permitted certain aliens to be paroled, that is, released from custody into the care of relatives or others who would vouch for their appearances at exclusion proceedings. The Haitians filed suit, claiming that the government had singled them out for discriminatory treatment by denying them parole when it was made available to others similarly situated.⁹⁵ As had the plaintiffs

91. *Id.* at 1041 n.48.

92. *Id.* at 1041.

93. 472 U.S. 846 (1985).

94. *Id.* at 855.

95. *See id.* at 848.

in the *Haitian Refugee Center* case, they brought an equal protection challenge.

The Eleventh Circuit held, en banc, that the government had plenary power to deal with exclusion and that this power extended to denying parole whenever it saw fit, unconstrained by any Fifth Amendment limitations; it did remand to the district court, however, to determine whether the INS had violated any of its own regulations.⁹⁶ The Supreme Court, in a decision written by Chief Justice Rehnquist, set aside the circuit court decision, not because the lower court decided the equal protection challenge wrongly but because it chose to address it at all:

We conclude that the Court of Appeals should not have reached and decided the parole question on constitutional grounds, but we affirm its judgment remanding the case to the District Court. . . . Had the court in *Jean II* followed [the] rule [of avoiding unnecessary constitutional construction], it would have addressed the issue involving the immigration statutes and INS regulations first, instead of after its discussion of the Constitution. Because the current statutes and regulations provide petitioners with nondiscriminatory parole consideration—which is all they seek to obtain by virtue of their constitutional argument—there was no need to address the constitutional issue.⁹⁷

Justices Marshall and Brennan were the sole dissenters. Their argument was elegant and simple:

The Court's decision rests entirely on the premise that the parole regulations promulgated during the course of this litigation preclude INS officials from considering race and national origin in making parole decisions. The Court then reasons that if petitioners can show disparate treatment based on race or national origin, these regulations would provide them with all the relief that they seek. Thus, it sees no need to address the independent question whether such disparate treatment would also violate the Constitution. . . . If the initial premise were correct, the Court's decision would be sound. But because it is not, the remainder of the Court's opinion simply collapses like a house of cards. . . . [A]n examination of the regulations themselves, as well as the statutes and administrative practices governing the parole of unadmitted aliens, indicates that there are no nonconstitutional constraints on the Executive's authority to make national-origin distinctions.⁹⁸

96. The Supreme Court summarized the decision of the Eleventh Circuit: The en banc Eleventh Circuit concluded that any such discrimination concerning parole would not violate the Fifth Amendment to the United States Constitution because of the Government's plenary authority to control the Nation's borders. That court remanded the case to the District Court for consideration of petitioners' claim that their treatment violated INS regulations, which did not authorize consideration of race or national origin in determining whether or not an excludable alien should be paroled.

Id. at 848.

97. *Id.* at 848, 854–55.

98. *Id.* at 858–59 (Marshall, J., dissenting).

The majority based its decision on a reading of the key regulation that permitted the grant of parole only under specified "neutral" circumstances.⁹⁹ However, it conveniently omitted all reference to the regulation's final paragraph, which gave the INS catch-all authority to grant parole to "aliens whose continued detention is not in the public interest as determined by the district director."¹⁰⁰ Thus, INS officials retained full authority to determine whether it was in the public interest to release Haitian detainees or continue to hold them. Only an act of creative misreading permitted the Court to avoid addressing a very simple question—whether the Equal Protection Clause (as read into the Fifth Amendment) prohibits racial discrimination in the enforcement of the immigration laws. It is troubling that the question even has to be asked.

Rather than answering the question, Congress in 1996 apparently deprived the courts of the opportunity to hear the sorts of claims raised by the petitioners in the Haitian cases.¹⁰¹ In the future, similar stories told by the oppressed certainly will be overheard by academic researchers and policy consultants. Those stories may even move the listeners to reconsider their own racial attitudes. But it seems that they will not be heard by the body vested by the Constitution and tradition with the power to right legislative wrongs and stem executive abuse.

C. *Historical Circumstance, Individual Choice, and the Legal Background*

A theme that emerges in much critical race scholarship is "choice." I do not deny that it exists. But it seems clear that choices are always constrained by historical circumstance. Almost certainly, I would not have been invited to contribute to this issue if I had not delivered a paper at the Immigration Law Teachers' Workshop in 1998 that featured a panel on race and immigration law. That panel was chaired by Kevin Johnson. The title of my paper was *Historical Development of U.S. Immigration Law in the Colonial and Antebellum Periods*. It probably ought to have been titled *Why the Irish Didn't Have to Become White: The Legal and*

99. The new parole regulations track the two statutory standards for the granting of parole: "urgent humanitarian reasons" or "significant public benefit." 8 C.F.R. § 212.5(a) (1999). The regulations first provide that "[t]he parole of . . . aliens who have serious medical conditions in which continued detention would not be appropriate" would generally be justified by urgent humanitarian reasons. 8 C.F.R. § 212.5(a)(1). The regulations then define five groups that "would generally come within the category of aliens for whom the granting of the parole exception would be 'strictly in the public interest,' provided that the aliens present neither a security risk nor a risk of absconding." 8 C.F.R. § 212.5(a)(2). The first four groups are pregnant women, juveniles, certain aliens who have close relatives in the United States, and aliens who will be witnesses in official proceedings in the United States. See 8 C.F.R. §§ 212.5(a)(2)(i)–(iv); see also *Jean*, 472 U.S. at 860–61 (Marshall, J., dissenting).

100. *Jean*, 472 U.S. at 860–61 (Marshall, J., dissenting) (quoting the language of then-extant 8 C.F.R. § 212.5(a)(2)(v)).

101. See 8 U.S.C. § 1226(e) (Supp. IV, 1998) ("No court may set aside any action or decision by the Attorney General regarding the detention or release of any alien.").

*Social Status of Irish Catholic Immigrants in America on the Eve of the Great Migration.*¹⁰²

The paper took issue with the thesis Noel Ignatiev propounded in *How the Irish Became White*.¹⁰³ Ignatiev argued that although early nineteenth-century Irish migrants were attracted to the radically egalitarian ideals of the French Revolution, and, more particularly, to the political program of Daniel O'Connell, they quickly "sold out," renouncing abolitionism and any hope for labor solidarity with free blacks in their desire to get ahead.¹⁰⁴ I believe Ignatiev credited O'Connell with more influence than he actually had. However, what principally distinguished Ignatiev's argument from that made by dozens of American historians since the 1950s was his discussion of motive. He argued that the Irish were not simply competitors with blacks for scarce jobs and not simply occupants of the very bottom rungs of the social ladder willing to climb over others on the way up that ladder. Instead, the Irish were motivated to act because, in a fundamental, legal sense, they were not sure whether America was going to assign them to the white or nonwhite side of the "color line." Therefore, they had to demonstrate their "whiteness" by creating a gulf between themselves and African Americans.¹⁰⁵

My paper did not question the extent of racial prejudice among early Irish immigrants. It did question Ignatiev's analysis of motives and especially his conflation of legal and social racial categories. Thus, I argued that however debased their circumstances, antebellum Irish immigrants arrived in America with a status that was fundamentally different from, and legally superior to, most (and after *Dred Scott*, all) blacks. The Irish were clearly on the white side of the "color line," eligible for national citizenship and entitled to almost immediate political rights in most states. They were also free from the legal disabilities imposed by slavery and by state laws controlling the interstate movement of free blacks.

Much of my argument centered on the legal status conferred by the Naturalization Clause of the Constitution¹⁰⁶ and its implementation in the Naturalization Act of 1790.¹⁰⁷ Ignatiev asserted:

The first Congress of the United States voted in 1790 that only "white" persons could be naturalized as citizens. Coming as immigrants rather than as captives or hostages undoubtedly affected the potential racial status of the Irish in America, but it did not settle

102. The workshop paper, delivered at Boalt Hall on May 30, 1988, was, in the main, a condensed version of a paper with the second title, which I presented at a Southern Regional American Council for Irish Studies meeting in Columbia, South Carolina, February 21, 1998. I quote liberally from that paper in the pages that follow.

103. IGNATIEV, *supra* note 2.

104. *See id.* at 16–31.

105. *See id.*

106. *See* U.S. CONST., art. I, § 8, cl. 4.

107. Naturalization Act of 1790, ch. 3, 1 Stat. 103.

the issue, since it was by no means obvious who was "white." In the early years Irish were frequently referred to as "niggers turned inside out"; the Negroes, for their part, were sometimes called "smoked Irish," an appellation they must have found no more flattering than it was intended to be.¹⁰⁸

Ignatiev further claimed that the "Congress raised problems that courts were wrestling with well into the twentieth century."¹⁰⁹ On the basis of a limited number of authoritative texts,¹¹⁰ I concluded that there was no uncertainty whatsoever that the Irish and indeed, all northern European immigrants who followed them, were "white" within the meaning of applicable law.

In making this argument, I did not suggest that the Irish in the pre-famine years were not, in some sense, a "racialized" minority. Nor did I suggest that racial categories are necessarily set in stone. Instead, I suggested the opposite. Thus, for the reasons given above I accepted the argument that race is socially constructed. My concern was with the way that it had been in fact constructed—and with the staying power and historical authority of the structure once erected.

The argument I made then is one that I believe in even more strongly now. Borrowing from Eric Williams and Fernand Braudel, it links "voluntary" migration, "indentured servitude," and slavery to European expansion into the New World.¹¹¹ The terms of the expansion over the course of time created what—with all irony intended—can only be called a "master race," in need of new recruits. In the beginning, most Irish—but never all, because they were regarded as "barbaric" and disloyal—were excluded. By the time of the American Revolution, however, they were grudgingly offered a seat at the table.¹¹²

Thus, to a significant degree, European Americans have always engaged in racial classifications, in which skin color—or some not entirely

108. IGNATIEV, *supra* note 2, at 41.

109. *Id.* at 41 n.26.

110. See TYLER ANBINDER, *NATIVISM AND SLAVERY: NORTHERN KNOW-NOTHINGS AND THE POLITICS OF THE 1850S* 117–18 (1992); JAMES KENT, *COMMENTARIES ON AMERICAN LAW* (photo. reprint 1984) (1826); *THE FOUNDERS' CONSTITUTION* (Philip B. Kurland & Ralph Lerner eds., 1987).

111. See 3 FERNAND BRAUDEL, *THE PERSPECTIVE OF THE WORLD: CIVILIZATION AND CAPITALISM, 15TH-18TH CENTURY* 392–99 (Siân Reynolds trans., 1984).

The everlasting problem in th[e] boundless landscape was . . . a shortage of manpower. For emergent America required a supply of labour that was plentiful, easily controlled, cheap—ideally costing nothing at all—in order to develop the new economy. Eric Williams's pioneering study, *Capitalism and Slavery*, points repeatedly to the causal links between slavery, near-slavery, serfdom, quasi-serfdom, wage-earning and quasi-wage-earning in the New World, and the rise of capitalism in old Europe. . . .

....

In fact one kind of servitude followed on the heels of another in the New World: the enslavement of the local Indian population led to its collapse; the servitude of white men (French *engagés* and English indentured servants) filled the gap for a while, especially in the West Indies and the English mainland colonies; and black slavery eventually created a community with the strength to put down roots and multiply, against all odds.

Id. at 392–93.

112. See *infra* text accompanying notes 120–29.

convincing proxy, such as “blood lines” — has been used to justify oppression. The “assignment” of Africans and their descendants to the “black” category was made by Europeans who maintained racial lines as an overt justification for permanently subjugating more than eighty percent of all seventeenth- and eighteenth-century migrants to America and the West Indies and their progeny to chattel slavery. The percentage of “slaves” brought to British mainland North America was considerably lower; in all probability, however, it exceeded one-third of the total.¹¹³

The process of racial assignment goes back at least as far as the mid-seventeenth century, when English colonists in America first began systematically to discriminate against the Africans in their midst. Here, I quote Michael Zuckerman:

Whereas settlers of the other European nations in the New World apprehended color categories in continua that reflected racial interbreeding, the English who colonized America acknowledged only the polarized alternatives of white and black. Whereas Spaniards and Portuguese evolved elaborate vocabularies that recognized the complexity of racial realities, Virginians and Carolinians put themselves racially apart from their slaves. Drawing a dichotomous color line between themselves and the Africans that denied all gradation or degree, they defied the abundant actuality of miscegenation and the evidence of the varied complexions before their eyes.¹¹⁴

Winthrop Jordan has given us a thorough and convincing account of how Europeans — and more particularly, the English — upon first encountering Africans, were struck by their color;¹¹⁵ exaggerated the difference between it and their own by calling it “black” and theirs “white;” and developed a complex system of subordination that depended, in large

113. Few Spaniards or Portuguese migrated to the New World. Their numbers were dwarfed by imported black slaves. Between 1630 and 1780, some 815,000 Europeans and 2,339,000 Africans were brought to the British settlements in the West Indies and on the North American mainland. Fewer than 650,000 of these Europeans settled on the mainland. In all probability, some 362,000 African and West Indian slaves were brought to the mainland between 1630 and 1780. See DAVID W. GALENSON, *WHITE SERVITUDE IN COLONIAL AMERICA: AN ECONOMIC ANALYSIS* 218 tbl.H4 (1981); Philip D. Morgan, *British Encounters with Africans and African Americans, Circa 1600–1780*, in *STRANGERS WITHIN THE REALM: THE CULTURAL MARGINS OF THE FIRST BRITISH EMPIRE*, *supra* note 46, at 162 tbl.1; *WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY* 55 (Robert W. Fogel et al. eds., 1992).

114. Michael Zuckerman, *Identity in British America: Unease in Eden*, in *COLONIAL IDENTITY IN THE ATLANTIC WORLD, 1500–1800*, at 115, 150 (Nicholas Canny & Anthony Padgen eds., 1994). Zuckerman notes:

[t]here was, to be sure, a more elaborate and complex set of color categories in the British West Indies than in the British colonies on the mainland. But this is, in the exact sense of the phrase, the exception that proves the rule, since even in the British Islands the intermediate categories were less elaborately and more grudgingly applied than in the French, Spanish, and Portuguese colonies.

Id. at 150 n.101.

115. Obviously, the Africans that Europeans encountered had a wide range of skin tones. These differences were sometimes noted, but, as Zuckerman suggests, they ordinarily had no effect in defining the underlying legal or social relationships between the English and the Africans. See *id.* at 150.

measure, on the assumed natural superiority of "white" over "black" in virtually every realm: physical beauty, intellectual capacity, spiritual development, and sexual self-control.¹¹⁶ All of this contributed to:

"a growing racist conviction that negroes were a non-human form of life." A pious woman of early Barbados maintained that "any minister who dared to baptise them might as well baptise a puppy." Another insisted that blacks "were beasts, and had no more souls than beasts." And in the Chesapeake and Carolinas, more than one planter actually named his Africans Ape or Monkey.¹¹⁷

This attitude also provided a strong set of justifications for chattel or bond slavery among those who established that institution and stood to gain from it. Those gains promised to be considerable. For, as Jordan argues, virtually from the beginning,

[a]t law . . . 'bond slavery' implied utter deprivation of liberty.

. . . Slavery was also thought of as a perpetual condition. While it had not yet come invariably to mean lifetime labor, it was frequently thought of in those terms. Except sometimes in instances of punishment for crime, slavery was open ended; in contrast to servitude, it did not involve a definite term of years. Slavery was perpetual also in the sense that it was often thought of as hereditary. It was these dual aspects of perpetuity which were to assume such importance in America.¹¹⁸

By 1636, the legal basis for perpetual slavery had been established in Barbados.¹¹⁹ Over the next seventy years, all of the British possessions in the Caribbean and on the southern mainland—as well as most northern jurisdictions—adopted the same rule. Special regulations governing the treatment of blacks (or, perhaps more commonly, of "Blacks, Indians, and Mulattos") were detailed in "black codes," which, although not as elaborate as their nineteenth-century counterparts, still regulated a wide range of activities, including the punishment, entertainment, and manumission of slaves, as well as the regulation of their commercial transactions, weapons possession, travel, and legal competency.¹²⁰

The development of a special body of slave law went hand-in-hand with the development of laws intended to establish the legal status and

116. See generally JORDAN, *supra* note 48, at 3–43.

117. Zuckerman, *supra* note 114, at 150.

118. JORDAN, *supra* note 48, at 53–54.

119. See STANLEY M. ELKINS, *SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE* 41 n.19 (1959).

[B]y 1636, Negroes were already coming into Barbados in great enough numbers that the governor's council felt it necessary in that year, law or no law, to issue a regulation declaring that all Negroes or Indians landed on the island would be considered as slaves, bound to work there for the rest of their lives. Even in the Spanish colonies, lifetime servitude had been familiar for nearly a century.

Id. (citations omitted).

120. For a typical statute dealing with virtually all these matters, see Act of Dec. 12, 1712, 1 Colonial Laws of N.Y. 161, entitled "An Act for Preventing, Suppressing and Punishing the Conspiracy and Insurrection of Negroes and other Slaves."

permissible treatment of European servants. Until the 1650s in Barbados, the 1680s in the Chesapeake, approximately 1700 in the Carolinas, and approximately 1760 in Georgia, the bulk of the labor force consisted of servants brought to America and required to serve for a term of years before being granted their "freedom."¹²¹ These servants remained the largest segment of the labor force in the middle colonies until the end of the colonial period. Often, we refer to such laborers as indentured servants; such a characterization, with its implicit emphasis on a signed paper recording an understanding between an intending employer and intending employee, treats such servitude as something freely chosen, voluntary in the fullest sense of the word.¹²²

This understanding captures part of the reality of seventeenth- and eighteenth-century labor history. Particularly in the eighteenth century, and particularly for especially "desirable" migrants, such as Irish Presbyterians, a relatively "free" market for servants existed, and intending immigrants could bargain over the terms and length of their employment.¹²³ Yet particularly in the seventeenth century, many of the Europeans who came to America as servants came without indentures of any kind. There simply is no evidence that most agreed to, or even understood, the terms of their servitude before departing. There is, however, ample evidence that a substantial percentage of those brought to America were brought against their will, either as convicts, victims of kidnappers, or political prisoners. As best we can tell, nearly 400,000 people migrated from the so-called British Isles to America and the West Indies during the seventeenth century.¹²⁴ At least twenty percent were coerced.¹²⁵ Of the 400,000, more than a quarter likely were Irish.¹²⁶ Virtually all—a point that deserves special emphasis—were Catholics. The rate of coercion for this subgroup was substantially higher, probably exceeding fifty percent.¹²⁷

The shortage of the white laborers desirable to employers, coupled with the decline of coerced white migration in the eighteenth century, meant that employers and politicians had to offer more incentives if they were to continue to attract white settlers. Migrants from Ireland did not

121. See GALENSON, *supra* note 113, at 118–26.

122. See, e.g., *id.* at 3 ("[M]any Europeans were enabled to emigrate to the New World by entering contracts of servitude called indentures." (emphasis added)).

123. See Farley Grubb, *The Auction of Redemptioner Servants, Philadelphia, 1771–1804: An Economic Analysis*, 48 J. ECON. HIST. 583 (1988). Grubb indicates that "Ulster Irish were able to negotiate 23 percent shorter contracts than Irish redemptioners from Dublin." *Id.* at 602 n.36.

124. See KERBY A. MILLER, *EMIGRANTS AND EXILES* 137 (1985).

125. See *id.* at 143–44.

126. See *id.* at 137. Miller, after noting that "emigration records are so incomplete that it is possible to achieve only the roughest estimates of numbers," indicates that, "[a]t best, we can guess that perhaps 50[,000]–100,000 Irish left Ireland [for America] in the 1600s." *Id.* For reasons that I give in an unpublished paper, I believe that the seventeenth-century number must exceed 100,000. See John A. Scanlan, *The "Great" Catholic Migration, 1620–1775: Motive, Opportunity, Policy, and Failure* (unpublished manuscript, on file with the *University of Illinois Law Review*).

127. See MILLER, *supra* note 124, at 143–44.

pose a problem per se; the most desirable servants of all were the so-called Scotch-Irish, generally—although not exclusively—Presbyterians from the northern province of Ulster who were almost indistinguishable physically from the “native Irish,” their southern Catholic counterparts.¹²⁸ “Passing” was almost certainly easy—and commonplace. Nevertheless, fears of Catholic disloyalty and religious prejudice promoted specifically anti-Catholic legislation in a number of colonies. In 1716, for example, South Carolina enacted a measure somewhat misleadingly entitled, “An act to encourage the importation of white servants into this Province.”¹²⁹ Its preamble noted that “there hath been imported into this Province several native Irish servants that are Papists.”¹³⁰ In response, it obliged:

all merchants or masters of vessels or others shall upon their oaths declare that to the best of their knowledge none of the servants by them imported be either what is commonly called native Irish, or persons of known scandalous character, or Roman Catholics. And if any merchant . . . shall ship any servants to this Province, he shall be obliged to send a certificate that such persons or servants are Protestants . . . and with such a certificate, Irish servants, being Protestants, may be lawfully imported here.¹³¹

The heavy concentration of Protestants among the Irish who arrived in America after 1700 was not accidental. Nor was it attributable to special hardships that Protestants faced in Ireland. Virtually every colony—and, on occasion, the British authorities—made conscious decisions in the late seventeenth and early eighteenth centuries to encourage Protestant immigration and discourage Catholic immigration.¹³² These policies were specifically and overtly religious.¹³³

128. See *id.* at 160–67.

129. FRANCIS X. CURRAN, *CATHOLICS IN COLONIAL LAW* 91 (1963) (quoting 2 THOMAS COOPER & D.J. MCCORD, *STATUTES AT LARGE OF SOUTH CAROLINA* 646–49 (Research Pubs., 1974) (1836–41)).

130. *Id.*

131. *Id.*

132. I offer a detailed account of restrictions on Catholic migration to colonial America in two unpublished papers. The first, *Political Boundaries, Economic Growth, and Religious Exclusion: Immigration Policy, Law, and State Formation in Colonial America*, was delivered at the Institute of International Law, Kiel University, Federal Republic of Germany, on June 18, 1991, and was substantially revised in 1995–96. It details specific provisions in the 1609 Virginia Charter effectively prohibiting the settlement of Catholics and subsequent anti-Catholic legislation in Maryland, Virginia, and the West Indies dating back to the 1620s and 1630s. Similar restrictions were adopted in “[t]he basic charters of all the New England colonies, except Rhode Island.” Arthur J. Riley, *Catholicism in New England to 1788*, at 237 (1936) (unpublished Ph.D. dissertation, American University). The paper also details specific measures adopted to curb Catholic immigration to Maryland, Massachusetts, New York, and even Pennsylvania in the last decades of the seventeenth century and the first decades of the eighteenth.

The second paper, *The “Great” Catholic Migration, 1620–1775: Motive, Opportunity, Policy, and Failure*, was delivered on September 27, 1997, at “The Scattering” Conference inaugurating the Irish Centre for Migration Studies at University College Cork, Republic of Ireland. It chronicles dozens of anti-Irish measures enacted in the West Indies, mainland North America, and Newfoundland during the seventeenth and eighteenth centuries. Most of these measures were explicitly or implicitly directed

Because religion in the end predominated over race and religious toleration in eighteenth-century America outsped racial toleration, the barriers to Irish Catholic migration began to break down rapidly in the last decades of the century. In the end, the Irish were aided by four things:

First, Africans and their offspring, virtually from the moment that the English first encountered them, universally were characterized as “black.” This designation was reserved to them exclusively, just as “red” was a designation reserved in America for native tribes, the so-called Indians. Almost from the beginning of European settlement, “blackness”—and to a lesser extent, “redness”—provided a justification for subjecting Africans, Indians, and their progeny to perpetual or bond slavery, a status never imposed on any English, Irish, Scotch, or European servant.

Second, largely for the reason explained above, by the early nineteenth century, it was apparent to nearly everyone—citizens and immigrants, slave holders and slaves, “nativist” politicians and the Irish themselves—that the Irish already were “white” and that they had been for a long time.

Third, after 1790 Irish “whiteness” entitled all Irish to national “citizenship”—a benefit that blacks were not able to claim until after the Civil War. This privilege was not nearly as provisional or tenuous as Ignatiev implies. Within the political framework of the early nineteenth century, it was not revocable. It ensured continuing large-scale migration from Ireland, including increased migration from the Catholic south.

Fourth, the enactment of the First Amendment in 1791 prohibited an alternative, religiously specific ground for barring Irish Catholic migrants from “national” citizenship or curtailing their immigration. The amendment, however, did not guarantee that all Irish immediately would be granted full political or social rights at the local level. In the struggle for those rights, Irish Catholics constituted a distinct and distinctly disfavored class. Racial or ethnic prejudice rendered Irish assimilation difficult, but after the American Revolution, those difficulties were confined almost exclusively to Catholic immigrants and their offspring. Religion, not race, rendered Irish Catholic assimilation difficult, often pitting Catholics against intensely bigoted Protestants—some of whom, like Theodore Parker, were also abolitionists.

In their new status as tolerated but unwelcome immigrants, the Irish Catholics who poured into the United States before the Civil War had

at Irish Catholics (commonly referred to as “papists”), rather than at their Presbyterian, Anglican, or Quaker counterparts.

133. Additional regulations were promulgated in virtually every colony attempting to obstruct the landing of paupers and convicts. Generally, these laws were facially neutral, since they applied equally to Protestants and Catholics. Such legislation undoubtedly garnered additional support, however, because a disproportionate percentage of the impoverished and those arriving under sentence of transportation were identified as Irish Catholics.

every incentive to look down on the faces at the bottom of the well. And, as Ignatiev demonstrates, they clearly did just that.¹³⁴ Yet their struggle for status and economic security was more complicated than Ignatiev imagines. Unlike those they looked down upon, the Irish Catholics had a toehold on a ladder fashioned from the Naturalization Act of 1790¹³⁵ and the First Amendment. The role they played in depriving free blacks of opportunity was substantial but probably less important than Ignatiev implies. Long before the Irish Catholics were a significant political force, white politicians of every stripe were closing doors to blacks. Even during the immediate antebellum era, Republicans were insisting that abolition would not bring full social equality.¹³⁶ The Civil War may have been fought to abolish slavery, but only a romantic would argue that it was fought to abolish racism.

The moral: it is appropriate to look critically at any group that secures privilege at the expense of another. But it is likely more worthwhile to look at the historical circumstances, the economic assumptions, and the institutions that always have informed the choices that people, individually and together, make.

134. See IGNATIEV, *supra* note 2.

135. The Naturalization Act of 1790, 1 Stat. 103.

136. In the first Lincoln-Douglas debate, conducted in Springfield, Illinois, on August 21, 1858, Stephen Douglas:

charged Lincoln with believing that the Negro was endowed with equality . . . and that no human law could deprive him of rights conferred "by the Supreme Ruler of the universe." "Now," Douglas added, "I do not believe that the Almighty ever intended the negro to be the equal of the white man. If he did, he has been a long time demonstrating the fact."

J.R. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* 148 (1978) (quoting *CREATED EQUAL? THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858*, at 111-12 (Paul M. Angle ed., 1958). Lincoln responded,

"I agree with Judge Douglas that he [African Americans] is not my equal in many respects—certainly not in color, perhaps not in moral and intellectual endowment. But in the right to eat the bread, without leave of anybody else, which his own hand earns, *he is my equal and the equal of Judge Douglas, and the equal of every living man.*"

Id. at 149.

In the same speech, Lincoln insisted: "I have no purpose to introduce political and social equality between the white and black races." *Id.* According to Pole, "elsewhere [Lincoln] denied that Negroes ought to be allowed to vote or to serve on juries." *Id.* These contradictory attitudes were not unique:

Douglas did not approve of slavery and did not want to deprive Negroes of the ability to earn their own living; neither of the antagonists proposed to place in the Negro's hands the political or even the civil powers that were needed to protect his admitted right to economic independence. The difficulties and inconsistencies in Lincoln's position were at least as serious as those which he successfully exposed in Douglas during the further course of the debates. He plainly held that equality in the rights enumerated in the Declaration of Independence could be guaranteed without conferring the rights normally connected with citizenship. His aim was to change attitudes but not institutions. The immense popular success of his own campaign which, though he lost the senatorial election, raised him to the national position from which he won the presidency two years later, should not obscure the fact that Lincoln was asserting incompatible principles. That, indeed, was part of the very reason for his success; the problem facing the numerous Republican supporters who wanted to see the Negroes free, who wanted them to support themselves in peace and safety, and who wanted the institutions of the country to ensure these things, but did not want to share those institutions with the African race, was extremely complex and had not yet been fully explored.

Id. at 149-50.

VII. CONCLUSION: THE LEGAL ACADEMY AND THE COMMITMENT TO CHANGE

Kevin Johnson asserts that:

Many, perhaps most, immigration law scholars are sympathetic to the rights of immigrants and frequently criticize immigration doctrine in a way that generally could be classified as "pro-immigrant." The white, liberal immigration law scholars, however, often do not fully acknowledge the racial influences or impact of the immigration laws¹³⁷

Much of these scholars' work, Johnson claims, "is abstract, distant from the impact on the lives of people affected by the operation of the law. Juiceless analysis of 'the law' . . . fails to capture the law's true effect on people's lives."¹³⁸ Because these scholars are so wedded to "viewing abstract legal principles without a concrete, real-life appreciation of how they actually operate in practice," they tend to ignore or dismiss "the thrust of the race-immigration scholarship."¹³⁹

This may be true. But I believe the argument understates the nature of the "sympathy"—and commitment—displayed by many, perhaps most "white, liberal immigration law scholars," most of whom are members of law school faculties belonging to several overlapping communities.

First, virtually all are lawyers. Many have joined law school faculties after years of private or governmental practice, where they often dealt with immigration matters. Others began teaching without extensive practical experience. Whatever their background, most possess J.D. degrees. As importantly, I am fairly certain that most faculty members teaching immigration law maintain their licenses to practice law and continue to represent clients. Many are actively involved with clinics, others do regular or occasional pro bono work, and a few maintain a private practice.

While some of these faculty members have offered legal advice to, or even represented, the INS, the State Department, or other governmental agencies, most have not. Instead, their legal work generally has been on behalf of aliens: typically, asylum seekers, political activists, students seeking the opportunity to remain in the United States, battered women, and those facing detention and probable removal because of alleged misconduct. Occasionally, they assist the UNHCR and voluntary agencies in the courts. More frequently, they accompany individuals to INS interviews, sit for long hours in dirty waiting rooms, and argue with clerks about missing papers or scheduling foul-ups. Or they represent their clients in hearings before immigration judges, mindful that if they

137. Johnson, *supra* note 11, at 550.

138. *Id.* at 551.

139. *Id.* at 550.

lose, those clients will be ordered out of the country with virtually no hope of obtaining a permanent reprieve from the courts. In those hearings, I am certain that they rely heavily—as they should—on “legal doctrine” and that many avoid history and social theory altogether. This practice of immigration law is about as far from the conventional notion of the ivory tower as I can imagine.

Second, as academics, all teach. Certainly, much of that teaching comes from the casebooks (or perhaps more properly, the single casebook)¹⁴⁰ to which Kevin Johnson objects because of failure to address Critical Race Theory directly enough or to quote extensively from its scholarship. But even those casebooks (if the plural is proper) raise issues about the Haitian cases and Haitian interdiction, the Chinese Exclusion Laws,¹⁴¹ the National Origins Quota System and its demise,¹⁴² and the troubling issue of “closed borders” in a world sharply divided between the haves and the have nots. Time constraints probably preclude massive outside reading, but I am certain that works by John Higham, Ronald Takaki, and Roger Daniels make their way into many classrooms. As importantly, I am certain that many classes make their way into immigration courts and client waiting rooms and that the experience helps convince students that people “of color” are especially disadvantaged by the system.

Third, as academics, all write. I detect far less legal doctrine in my colleagues’ work than Kevin Johnson does. I detect far more interest in policy. I would like to see more articles addressing the racial dimensions of that policy. But I have no quarrel with those who prefer to focus on gender issues, poverty issues, free speech issues, or even on the meaning of “citizenship” or the justification of border controls. Ours is a big boat. Further, I believe that some of the finest immigration scholars not (to my knowledge) directly involved with, or perhaps even overly sympathetic with, Critical Race Theory, have written perceptively about the role that race has played in our nation’s distant or recent history. Certainly, Kenneth Karst comes to mind,¹⁴³ but so do Linda Bosniak,¹⁴⁴ Gerald Neumann,¹⁴⁵ and Michael Scaperlanda.¹⁴⁶

140. The textbook referred to is ALEINIKOFF ET AL., *supra* note 76.

141. See *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581 (1889).

142. The National Origins Quota System was eliminated by the Immigration Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C. (1994)).

143. See KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989).

144. See Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994).

145. See Gerald L. Neumann, *Whose Constitution?*, 100 YALE L.J. 909 (1991).

146. See Michael Scaperlanda, *The Domestic Fourth Amendment Rights of Aliens: To What Extent Do They Survive* *United States v. Verdusco-Urquidez*?, 56 MO. L. REV. 213 (1991); Michael Scaperlanda, *Who Is My Neighbor?: An Essay on Immigrants, Welfare Reform, and the Constitution*, 29 CONN. L. REV. 1587 (1997).

Race matters. Critical Race Theory matters. Legal doctrine matters, and so does public policy. What matters most in the academy, though, is that we speak to each other, listen, and come away enriched. The satisfaction we gain from such conversations, conducted out loud or in the law reviews, will help sustain us as we greet the new millennium and confront American racism entering its fifth century.

